

# Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World

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*The Freedom of Information Act (FOIA), created to allow citizens greater access to government documents, confronted a new challenge after the terrorist attacks of September 11, 2001. FOIA's application has fluctuated over the past four decades in accordance with congressional amendments and presidential administrations' interpretations. The Bush Administration has sought to curtail FOIA's reach by implementing a “sound legal basis” standard for FOIA requests in the interests of homeland protection—a move that has garnered substantial criticism from media organizations and open-government advocates. A recent decision by the United States Court of Appeals for the District of Columbia has vindicated the Administration's policy by deferring to agency expertise on matters of security and law enforcement. This Note argues that courts should defer to the decisions of law enforcement agencies to withhold information requests under FOIA in an effort to promote greater homeland protection. However, courts must still ensure that there is at least a minimal articulation regarding why such deference is reasonable.*

“[P]ublic disclosure is not always in the public interest . . . .”<sup>1</sup>

## I. INTRODUCTION

The Freedom of Information Act (FOIA)<sup>2</sup> was enacted in the mid-1960s to give American citizens greater access to government documents in an effort to prevent both the practice and perception of government secrecy.<sup>3</sup> The world has changed considerably since the mid-1960s, most recently with the tragic attacks on the World Trade Center and the Pentagon on September 11, 2001. In reaction

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<sup>1</sup> *CIA v. Sims*, 471 U.S. 159, 167 (1985).

<sup>2</sup> 5 U.S.C. § 552 (2000).

<sup>3</sup> See 110 CONG. REC. 17,087 (1964) (statement of Sen. Long). “A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and masks their loyalty.”

to the attacks, the federal government quickly tightened security.<sup>4</sup> Only weeks later, Attorney General John Ashcroft issued a memorandum to all federal departments and agencies that stated the Bush Administration's commitment to complying with the requirements of FOIA,<sup>5</sup> but hinted that agencies would be given more discretion to retain information.<sup>6</sup> The post-9/11 world has marked a new era in the history of FOIA, one that has sparked significant controversy.<sup>7</sup>

This Note argues that this increased deference, if any, for law enforcement agencies to withhold information under exemption 1 or exemption 7 of FOIA<sup>8</sup> is a necessary step to promote greater homeland protection. While extending deference, the courts must still ensure that the government takes steps to reasonably segregate requested information. Such deference must be appropriately limited to matters of homeland security. While courts should defer to the expertise of agencies, the courts still have the initial screening function of ensuring that there is at least minimal articulation of why the exemptions are reasonable.

Part II of this Note addresses why open government is important in the aftermath of September 11th. Part III traces the history of FOIA from its inception in 1966, through multiple amendments, presidential administration adjustments,

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<sup>4</sup> Most notable was the federal enactment of the "Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act," better known as the USA-PATRIOT Act which, among other expansions in law enforcement and prevention powers, increased the government's electronic surveillance powers in multiple ways. See DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 341-44 (2003) (providing descriptions of the Act's changes in definition of terrorism, delayed notice of search warrants, and expansion of wire tap use by government agencies). For an analysis of how the USA-PATRIOT Act developed, see Steven Brill, *After: How America Confronted the Sept. 12 Era*, NEWSWEEK, Mar. 10, 2003, at 66.

<sup>5</sup> John Ashcroft, Memorandum for Heads of All Federal Departments and Agencies on the Freedom of Information Act (Oct. 12, 2001), available at <http://www.usdoj.gov/04foia/011012.htm>. See *infra* note 76.

<sup>6</sup> See *infra* Section IV(A).

<sup>7</sup> See Charles N. Davis, The Freedom of Information Center, *Celebrate the Freedom of Information Act's 37th Anniversary on March 16, 2003!*, at <http://foi.missouri.edu/federalfoia/celebratefoia.html> (last updated Feb. 20, 2003) ("Much has been said and written about the Bush Administration's post-Sept. 11 clampdown on information, which has vastly expanded the zone of secrecy surrounding the White House, the government's anti-terrorism efforts and even more benign government documents.").

<sup>8</sup> 5 U.S.C. § 552(b)(1), (7) (2000) (exempting classified information in the interest of national defense and information compiled for law enforcement purposes). The construction of FOIA allows total disclosure of requested government documents, unless the request is specifically exempted in one of the first seven categories in 5 U.S.C. § 552(b)(1)-(7). Courts are to evaluate "whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

and significant court cases. Part IV highlights the “changes” to FOIA after September 11th by the Bush Administration. Part V analyzes one of the first appellate court cases dealing with the FOIA law enforcement exemptions after 9/11, *Center for National Security Studies v. United States Department of Justice*. Part VI argues that greater deference to FOIA exemptions is appropriate and necessary as long as the government demonstrates a reasonable attempt to segregate requested information, and as long as it is applied only to homeland security matters.

## II. IMPORTANCE OF OPEN GOVERNMENT IN THE AFTERMATH OF SEPTEMBER 11TH

The Freedom of Information Act was created to protect the public’s “right to know what its government is doing”<sup>9</sup> by establishing “a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.”<sup>10</sup> The preeminent principle behind FOIA was to ensure the public’s right to know what its “[g]overnment is up to.”<sup>11</sup> This was a dramatic step toward the democratic ideal of an open government<sup>12</sup> considering the fact that “[s]ecrecy in American government has a long history.”<sup>13</sup> While desiring

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<sup>9</sup> S. REP. NO. 89-813, at 5 (1965).

<sup>10</sup> *Id.* at 3; see Mathew J. Salzman, *Exemption 7(D) of the Freedom of Information Act—The Evidentiary Showing the Government Must Make to Establish that a Source is Confidential*, 84 J. CRIM. L. & CRIMINOLOGY 1041, 1042 (1994).

<sup>11</sup> *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); see also John Moon, *The Freedom of Information Act: A Fundamental Contradiction*, 34 AM. U. L. REV. 1157, 1158 (1985) (“The salient statutory basis of government disclosure law, the FOIA, is viewed by many as one of the crown jewels of liberalism.”).

<sup>12</sup> See *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1964) (Black, J., concurring) (“The press was protected [by the First Amendment] so that it could bare the secrets of government and inform the people.”); Moon, *supra* note 11, at 1169 (“Several commentators have argued that the Constitution provides an implicit right to governmental information . . . [T]he Framers intended the first amendment to encompass a right to government access.”); see also *Reporters Comm.*, 489 U.S. at 772–73 (explaining that the purpose of FOIA is to lift the veil of “secrecy in government”).

<sup>13</sup> Martin D. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL’Y 51, 58 (2002) (providing extended discussion on the Framers’ views on public access to government and freedom of the press). For an extensive discussion on the history of government non-disclosure of information during wartime, see generally JEFFREY A. SMITH, *WAR & PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999).

open disclosure as much as possible,<sup>14</sup> even the Framers recognized that there should be limits and that important matters of state must be allowed to be conducted with some level of confidentiality.<sup>15</sup> Open government disclosure to allow for an informed citizenry is a desirable value to protect, but such an interest must be balanced against the need for the same government to withhold some information in order to operate effectively and efficiently in protecting its citizenry.<sup>16</sup>

The government has struggled in upholding this democratic ideal of transparent government after the attacks of September 11th.<sup>17</sup> In the weeks and

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<sup>14</sup> As Justice Lewis Powell noted, “[P]ublic debate must not only be unfettered; it must also be informed.” *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 862–63 (1974) (Powell, J., dissenting); see also Martin Scordato & Paula Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL’Y REV. 185, 197 (2002) (“If the legitimate authority of the government comes only from the consent of the governed, then it is important, in order for the government to possess legitimate authority, for those granting their consent to be reasonably well informed.”); Larry Maxcy, Letter to the Editor, *Secrecy vs. Democracy*, N.Y. TIMES, Jan. 4, 2003, at A10 (quoting Harry Truman by stating that “[s]ecrecy and a free, democratic government don’t mix”).

<sup>15</sup> See Halstuk, *supra* note 13, at 74–76 (“The absence of a consensus that the public had a right to know what government was doing informs the question of whether historical evidence supports the idea of a First Amendment right of press access to government information.”). Halstuk also stated, “commentators thus are overreaching when they assert there is a post-First Amendment, Federalist-era basis to support an argument for a constitutional right of access to government information and operations.” *Id.* But see Moon, *supra* note 11, at 1169 (pointing out that several commentators have argued that the Constitution contains an implicit right to government information based on multiple theories).

<sup>16</sup> See *ACLU v. Dep’t of Justice*, 265 F. Supp. 2d 20, 27 (2003) (“FOIA represents a carefully considered balance between the right of the public to know what their government is up to and the often compelling interest that the government maintains in keeping certain information private, whether to protect particular individuals or the national interest as a whole.”); see also Editorial, *Why Not Disclose?*, WASH. POST, Oct. 31, 2001, at A26. The editorial states:

The government has an enormously difficult and in some ways contradictory task. It must do its utmost not just to prosecute any surviving conspirators in the Sept. 11 attacks but also to try to prevent a recurrence. At the same time, lest it abandon some of the very principles for which it is fighting, it must act within traditional constitutional bounds.

*Id.*; see also Moon, *supra* note 11, at 1169 (“The talisman for the Framers was necessity: society would tolerate governmental secrecy only when necessary for the well-being of the nation.” (internal citation omitted)).

<sup>17</sup> See William Zolla II, *The War at Home: Rising Tensions between Civil Liberties and our National Security*, 17 CBA REC. 32, 32 (2003). Zolla states:

Critics of the Government, represented by a broad coalition of civil liberties, human rights and religious groups, as well as academics and media organizations, contend that the Government’s zealous pursuit of terrorists is being waged with little regard for the rights of the accused suspects or their families, and largely beyond the view of the public.

months after the attacks, the government engaged in massive investigative efforts into the attacks and passed preventative measures.<sup>18</sup> A cry went out that civil liberties were under attack, as some immigrants were tracked and monitored.<sup>19</sup> Free speech against U.S. government actions was viewed as discouraged<sup>20</sup> and the possibility of profiling against Arab-Americans was the source of fierce public debate.<sup>21</sup>

As a conceptual cousin to civil liberties, the attitude and application surrounding FOIA was also questioned. About 1,100 individuals were detained for questioning during the government's terrorist investigations,<sup>22</sup> and a substantial number of those were detained for an extended period.<sup>23</sup> When questioned about the arrests and detentions, the Department of Justice would not disclose any information.<sup>24</sup> These denials led to FOIA requests by various organizations, one of which was denied, but subsequently appealed in federal court.<sup>25</sup> This appeal, *Center for National Security Studies v. United States Department of Justice*, will be the focus of Part V of this Note.<sup>26</sup>

With civil liberties being impaired and the nation maintaining vigilance (some would say exhibiting paranoia), FOIA stood, and still stands, at a cross-

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*Id.*; see also Scordato & Monopoli, *supra* note 14, at 185 ("On September 11, 2001, the American vision of the world changed forever.").

<sup>18</sup> See, e.g., USA-PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>19</sup> See Diana Jean Schemo, *Access to U.S. Courses Is Under Scrutiny in Aftermath of Attacks*, N.Y. TIMES, Sept. 21, 2001, at B7 (voicing concerns that foreign national students could face anti-foreign sentiment but also highlighting that colleges could keep better tabs on what foreign students are studying).

<sup>20</sup> See Scordato & Monopoli, *supra* note 14, at 185-86; see also Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent is Muted: Debate Grows over Balancing Security and Free Speech*, N.Y. TIMES, Sept. 28, 2001, at A1.

<sup>21</sup> See William Glaberson, *Racial Profiling May Get Wider Approval by Courts*, N.Y. TIMES, Sept. 21, 2001, at A16.

<sup>22</sup> Editorial, *Disappearing in America*, N.Y. TIMES, Nov. 10, 2001, at A22.

<sup>23</sup> Editorial, *Government Too Secretive About Jailing Immigrants*, ATLANTA J. CONST., Nov. 12, 2001, at A11 ("Civil liberties groups and Justice Department sources have estimated that 1,100 immigrants—mostly from Saudi Arabia, Pakistan and Egypt, mostly men in their 20s and 30s—have been arrested since Sept. 11, and approximately half of those are still being held.").

<sup>24</sup> See Editorial, *Why Not Disclose?*, *supra* note 16. The editorial states:

The Department of Justice continues to resist legitimate requests for information regarding the 1,017 people it acknowledges having detained in its investigation of the Sept. 11 attacks on the World Trade Center and Pentagon. Civil liberties and other groups have been reduced to filing a request for the data under the Freedom of Information Act.

*Id.*

<sup>25</sup> See 5 U.S.C. § 552(a)(4)(B) (2000) (concerning the procedural rules on appeals).

<sup>26</sup> *Ctr. For Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

road and challenging time. As the district court noted, “[d]ifficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law.”<sup>27</sup> Of particular interest, and the focus of this inquiry, are exemption 1 and exemption 7 of the FOIA. Exemption 1 protects classified information from disclosure and exemption 7 exempts releasing information “compiled for law enforcement purposes.”<sup>28</sup>

How much latitude should these exemptions be given in the post-9/11 world? Although the national-security context requires increased deference to the expertise of security and law enforcement agencies, the text of FOIA has not been altered and courts should continue to play a screening function to satisfy the exemption language. Thus, federal agencies, most notably law enforcement agencies in the newly created Office of Homeland Security,<sup>29</sup> are unlikely to significantly abuse the FOIA exemptions if courts fulfill their screening role by requiring some articulation for the exemptions and some level of segregation among requests. Open government is an important interest to a liberal, democratic society and must be preserved, but an equally vital priority for our society is that of protection.<sup>30</sup> Any increased deference for law enforcement agencies to

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<sup>27</sup> *Ctr. For Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94, 96 (D.D.C. 2002); see also *Interview: Professor Jane Kirtley Discusses the Restriction of Information Released by the Government on the Grounds of National Security Problems* (NPR radio broadcast, Feb. 14, 2002), available at <http://www.npr.org/transcripts/story.html> [hereinafter Kirtley Interview] (“[The September 11th attacks are] making a lot of people very frightened. And I think the tendency when you're frightened is to develop this sort of bunker mentality. . . . That, to me, is irresponsible at any time, but in times of national crisis, it can really lead to tragedy.”).

<sup>28</sup> 5 U.S.C. § 552(b)(7).

<sup>29</sup> The Office of Homeland Security was created by law on Nov. 25, 2002; the Office opened on Jan. 24, 2003 to meet the homeland threat posed by terrorism. Pub. L. No. 107-296, 116 Stat. 2135 (2002), (to be codified at 6 U.S.C. § 133). For additional information regarding the Office of Homeland Security, see generally the Office's official website at <http://www.whitehouse.gov/homeland>. Currently there is a discussion on how the Office of Homeland Security will create its FOIA regulations as required under 5 U.S.C. § 552(a)(1). The Reporter's Committee for Freedom of the Press is:

[A]sking that the agency incorporate an expedited review provision adopted by the Department of Justice that gives priority to FOI requesters who can show that there is “widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.” The Justice department had granted expedited review for some requests regarding arrest of detainees that were made to the Immigration and Naturalization Service.

The Reporter's Committee for Freedom of the Press, *Behind the Homefront*, (Feb. 27, 2003), at [http://www.rcfp.org/behindthehomefront/archive/2003\\_02.html](http://www.rcfp.org/behindthehomefront/archive/2003_02.html).

<sup>30</sup> *Ctr. For Nat'l Sec. Studies*, 215 F. Supp. 2d at 96. The court stated:

withhold information under exemption 1 or exemption 7 of FOIA<sup>31</sup> is necessary to promote security in our current world environment, as long as some reservations are made.

### III. HISTORY OF FOIA

FOIA has developed over the second half of the twentieth century and now faces a new challenge after the 9/11 attacks. FOIA application and emphasis has fluctuated throughout presidential administrations, leading up to the present controversy with the Bush Administration.

#### A. Congressional History of FOIA

FOIA had its genesis in the late 1950s when a California congressman named John Moss became interested in the public's access to government information.<sup>32</sup> During congressional hearings concerning a potential freedom of information bill, federal agencies, led by the Department of Justice, protested vigorously that costs outweighed public benefit and the forerunner to the FOIA, the Administrative Procedure Act, was really not that secretive.<sup>33</sup> But after revisions and political maneuvering,<sup>34</sup> Senate bill 1160 passed in the Senate in 1965,<sup>35</sup> and in the House on June 20, 1966, by a vote of 308-0.<sup>36</sup> President Johnson could have pocket vetoed the bill, but was persuaded to sign it on July 4, 1966.<sup>37</sup> The newly-signed

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The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.

*Id.*

<sup>31</sup> 5 U.S.C. § 552(b)(1), (7) (2000) (exempting classified information in the interest of national defense and information compiled for law enforcement purposes).

<sup>32</sup> See 1 JAMES T. O'REILLY, *FEDERAL INFORMATION DISCLOSURE* § 2:1 (3d ed. 2000).

<sup>33</sup> *Id.* § 2:3, at 12.

<sup>34</sup> *Id.* § 2:3, at 12–13.

<sup>35</sup> S. REP. NO. 89-813 (1965).

<sup>36</sup> 112 CONG. REC. 13,661 (1966). Ironically, several speakers who would later have to deal with FOIA praised Congressman Moss and the Act—including future Secretaries of Defense and FOIA suit defendants Melvin Laird and Donald Rumsfeld, and future President Gerald Ford who vetoed the 1974 amendments. See 112 CONG. REC. 13,640, 13,654 (1966); see also O'REILLY, *supra* note 32, § 2:4, at 14–15.

<sup>37</sup> President Johnson felt pressure from news media organizations to sign the bill. Federal agencies continued to protest against such a bill, and Johnson had his own reservations having never supported any expansion of public information in his time as senate leader. See O'REILLY, *supra* note 32, § 2:4, at 15.

bill contained rough versions of both exemptions 1<sup>38</sup> and 7.<sup>39</sup>

FOIA was amended in 1974 after Watergate's "national security" abuses of secrecy prompted congressional reform of the broad reach of the (b)(1) exemption.<sup>40</sup> Courts had seemed especially reluctant to involve themselves in national-security matters and the classification of documents.<sup>41</sup> The amendment passed overwhelmingly in both the House and Senate,<sup>42</sup> and while President Ford vetoed the amendment,<sup>43</sup> the Senate overrode the veto.<sup>44</sup> The amendment had some impact on (b)(1) cases.<sup>45</sup>

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<sup>38</sup> The initial form of the (b)(1) exemption gave almost total deference to agency decisions. *See* *EPA v. Mink*, 410 U.S. 73, 81-84 (1973). It also gave the President power to set the limits on disclosure by issuing an executive order. *See* Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 NOTRE DAME L. REV. 417, 445 (1964).

<sup>39</sup> For the (b)(7) exemption, drafters initially believed that law enforcement records were covered under other statutes (such as the Jencks Act, 18 U.S.C. § 3500 (2000), which restricted discovery rights for criminal defendants) and judicial precedent. *See* O'REILLY, *supra* note 32, § 17:2, at 90-93. Vigorous federal agency testimony, though, eventually won an exemption for "investigatory files compiled for law enforcement purposes except to the extent they are by law available to a party other than an agency." Pub. L. No. 90-23, 81 Stat. 55 (1967). President Johnson highlighted the need for protecting investigatory files. *See* Statement by the President upon Signing the "Freedom of Information Act," 2 PUB. PAPERS 699 (July 4, 1966).

<sup>40</sup> *See, e.g., Freedom of Info., Executive Privilege, Secrecy in Gov't: Hearing before the Subcomm. on Intergovernmental Relations of the Comm. on Governmental Operations*, 93d Cong. 20 (1973) (testimony of Courtney Sheldon).

<sup>41</sup> *See* *Epstein v. Resor*, 421 F.2d 930, 933 (9th Cir. 1970) (stating that "what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with."); *Wolfe v. Froehlke*, 358 F. Supp. 1318, 1320 (D.D.C. 1973), *aff'd*, 510 F.2d 654 (D.C. Cir. 1974), ("The realm of foreign relations is as inappropriate for judicial intervention as is the realm of national security . . ."); *EPA v. Mink*, 410 U.S. 73, 84 (1973) (The government's burden was only to show the classification and that it was within national defense and foreign policy range. If it did, "the duty of the District Court under § 552(a)(3) [ordering public access under FOIA] was . . . at an end.").

<sup>42</sup> Votes for passage were 383-8 in the House and 64-17 in the Senate. After the veto the votes were 371-31 in the House and 65-27 in the Senate. *See* O'REILLY, *supra* note 32, § 11:3, at 510 n.21.

<sup>43</sup> President Ford worried that allowing courts to make classification decisions was a separation of powers concern. *See* Veto of Freedom of Information Act, 10 WEEKLY COMP. PRES. DOC. 1318 (Oct. 17, 1974) (The "courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise"; instead, President Ford wanted (b)(1) confidentiality to be preserved if "a reasonable basis to support [the classification]" could be found by the court.).



Exemption 7 was also amended in 1974 when Congress sought to promote more judicial review of law enforcement claims.<sup>46</sup> The language was expanded to its present form, where the federal agency must show that a particular record is “compiled for law enforcement purposes” and that disclosure would cause one of the enumerated harms.<sup>47</sup> As to be expected from President Ford’s veto of the FOIA amendments, his administration continued to encourage agencies to be stingy with the release of documents within the congressional mandate.<sup>48</sup> The

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<sup>44</sup> 120 CONG. REC. 36,955 (1974). For a thorough discussion on the 1974 amendments, see Note, *National Security and the Amended Freedom of Information Act*, 85 YALE L.J. 401 (1976).

<sup>45</sup> Federal agencies realized they could not abuse their exemption power with “manifestly erroneous” classifications. See Note, *supra* note 44, at 416. Courts demand greater showings by the government in some instances. See *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978) (setting forth five characteristics for de novo review regarding national security); *Weissman v. CIA*, 565 F.2d 692 (D.C. Cir. 1977) (holding that an agency can satisfy its burden by showing that proper classification procedures were followed and the document logically falls into an exempt category); *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1368 (4th Cir. 1975) (holding that there is a rebuttable presumption that a (b)(1) claim is exempt if described by an agency as classifiable and it was “useful, if not vital, to national security”). But often courts were still hesitant to overrule classification documents. See O’REILLY, *supra* note 32, § 11:4, at 515. (“The initial cases under the amended Act revealed more pressure against the government’s position, but continued judicial unwillingness to release sensitive data to the public, because of the potential harms to national security, military, or foreign affairs.”)

<sup>46</sup> Judicial interpretations tended to be quite deferential to exemption 7 claims. See Larry P. Ellsworth, *Amended Exemption 7 of the Freedom of Information Act*, 25 AM. U. L. REV. 37, 42 (1975–76) (mentioning four federal cases that denied disclosure under exemption 7 and turned congressional “concern into action”). Critics of the exemption had argued for such changes for years. See, e.g., Ralph Nader, *Freedom from Information*, 5 HARV. C.R.-C.L. L. REV. 1 (1970); see also O’REILLY, *supra* note 32, § 17:4, at 97.

<sup>47</sup> The 1974 exemption 7 amendments provide:

[I]nvestigatory records compiled for law enforcement purposes [are exempt] only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7) (Supp. V 1975), *amending* 5 U.S.C. § 552(b)(7) (1970). Opponents worried that such an expansion would impair the FBI and its informants. See 120 CONG. REC. 17,039 (1974). This was President Ford’s major objection in vetoing the amendments. See *Veto of Freedom of Information Act*, *supra* note 43, at 1318. But Congress was committed to greater public access and limited government secrecy. See O’REILLY, *supra* note 32, § 17:4, at 102.

<sup>48</sup> Edward H. Levi, Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act 4–12 (1975), *available at* <http://www.usdoj.gov/04foia/>

Carter Administration, in contrast, encouraged more openness—but not zealously.<sup>49</sup>

FOIA was amended again in 1986, where the (b)(1) exemption was slightly expanded. Congress created a “terrorist exclusion,” allowing government agencies to avoid telling a requestor whether or not requested records existed.<sup>50</sup> Exemption 1 presently excludes release under the FOIA for matters “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order.”<sup>51</sup>

The (b)(7) exemption enjoyed greater expansion in 1986 in many respects.<sup>52</sup> First, the exemption 7 language had the phrase “investigatory records” changed to “records or information,” so now exemption 7 potentially protects all “records or

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74agmemo.htm. See O'REILLY, *supra* note 32, § 17:4, at 102 n.37 (“This [memorandum] was more rational . . . but certainly does some stretching of the congressional intent for the preservation of secrecy.”); see also Ellsworth, *supra* note 46, at 49 n.50.

<sup>49</sup> See O'REILLY, *supra* note 32, § 11:15, at 530 (stating that Carter personally thought the FOIA should be used moderately, but recognized the benefits of disclosure).

<sup>50</sup> See 5 U.S.C. § 552(c)(3) (2000), *added by* Pub. L. No. 99-570, 100 Stat. 3207 (1986). In matters of counterintelligence, foreign intelligence, or terrorism, the FBI or CIA is legally able to respond that there are no records which are subject to the Act. See O'REILLY, *supra* note 32, § 11:11, at 528. Courts continued to be highly deferential to the government in exemption (b)(1) cases. See DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE (May 2002), available at [www.usdoj.gov/oip/exemption1.htm](http://www.usdoj.gov/oip/exemption1.htm) (last visited November 21, 2003) (“[C]ourts have generally deferred to agency expertise in national security cases. Indeed, courts are usually reluctant to substitute their judgment in place of the agency’s ‘unique insights’ in the areas of national defense and foreign relations.”) (citations omitted).

<sup>51</sup> 5 U.S.C. § 552(b)(1)(A), (B).

<sup>52</sup> Exemption 7 presently excludes matters from FOIA release if they are:

[R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

information compiled for law enforcement purposes.”<sup>53</sup> Second, apart from exemption 7(B) and (E), the federal agency no longer had to demonstrate that disclosure “would” cause the harm described, but rather that disclosure “could reasonably be expected to” cause the described harm.<sup>54</sup>

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<sup>53</sup> Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207, 3207-48 to -49 (1986).

<sup>54</sup> *Id.* § 1802, 100 Stat. at 3207-48 to -49. The adjustment to exempt all “information” compiled for law enforcement purposes eased the burden for agencies who struggled with the “investigatory” requirement. Courts might disqualify some sensitive law enforcement information by requiring “investigatory” files to relate to a specific law enforcement inquiry, not just a routine monitoring or surveillance. *See* DEP’T OF JUSTICE, *supra* note 50. *Compare* *Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 509 F.2d 527, 529–30 (D.C. Cir. 1974) (holding that records merely submitted for monitoring employment discrimination are not “investigatory”), *with* *Ctr. for Nat’l Policy Review on Race & Urban Issues v. Weinburger*, 502 F.2d 370, 373–74 (D.C. Cir. 1974) (holding that records of an agency review of public schools suspected of discrimination are “investigatory”). With the amendment, a specifically enumerated investigation was not needed, as was previously required.

The expansion of only exempting a “record” to any item of “information” was a codification of the Supreme Court’s determination that an item of information originally obtained by an agency for a law enforcement purpose does not lose exemption (b)(7) protection because it is maintained or moved to a non-law enforcement record in *FBI v. Abramson*, 456 U.S. 615, 631–32 (1982) (“We hold that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose.”). For an extensive discussion on *Abramson*’s impact and its threshold requirement, see Richard A. Kaba, Note, *Threshold Requirements for the FBI Under Exemption 7 of the Freedom of Information Act*, 86 MICH. L. REV. 620, 628–31 (1987) (“If the FBI can meet this threshold requirement [compiled for law enforcement purposes] and can then show that one of the six specific harms would occur or ‘could reasonably be expected’ to occur, the information is exempt from disclosure under FOIA.”).

The second major substantive change to the exemption replaced “would” with “could reasonably be expected to.” Greater deference to the exemption was warranted with the open-ended language. *See, e.g.,* *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989) (stating that “would constitute” standard alteration to “could reasonably be expected to constitute” standard “represents a considered congressional effort to ease considerably a Federal law enforcement agency’s burden in invoking [the exemption]”); *see also* Edwin Meese, III, Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act (Dec. 1987), *available at* <http://www.usdoj.gov/04foia/86agmemo.htm> (“This pointed substitution of the phrase ‘could reasonably be expected to’ for ‘would’ in these four exemptions obviously establishes a more relaxed harm standard to be met by agencies in invoking them, a lesser risk of harm that need be shown.”). The Reagan Administration had worked hard for such adjustments:

The enactment of the Freedom of Information Reform Act of 1986 (“FOIA Reform Act”) marks the culmination of many years of administrative and congressional consideration of the need for such legislative reform. From the beginning, the most significant driving force behind these efforts was the need for greater law enforcement protection under the FOIA. In 1981, Federal Bureau of Investigation Director William H.

## B. Reagan Administration Application

While the statutory language of the Act provides the contours of the law, a presidential administration can have a significant impact on the application of FOIA and how requests will be handled. The Reagan Administration undoubtedly

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Webster testified to the vulnerability of the FBI and other federal law enforcement agencies to use of the FOIA by sophisticated requesters for purposes of gleaning sensitive law enforcement information; his testimony demonstrated that the strengthening of the Act's law enforcement protections was necessary to avoid the impairment of vital law enforcement interests.

*Id.* (citations omitted).

The change in language was clearly a welcomed move by law enforcement:

A major easing of the agency's proof can be expected from the addition of the phrase, *can reasonably be expected to*, in front of existing exemption language for the subsets of exemptions covering interference with law enforcement and revelation of confidential source identities or source-derived information. The strong need for proof in the case law of the 1974 FOIA exemption (b)(7) led the law enforcement community to lobby for an easing of the standard. Showing that a reasonable expectation exists will be far easier than demonstrating effects with greater specificity.

O'REILLY, *supra* note 32, § 17:5, at 103.

The "law enforcement purposes" language includes both civil and criminal statutes, along with administrative proceedings. *See Rural Hous. Alliance v. USDA*, 498 F.2d 73, 81 n.46 (D.C. Cir. 1974) ("[L]aw enforcement purposes . . . include both civil and criminal purposes . . ."); *Ctr. for Nat'l Policy Review on Race & Urban Issues v. Weinburger*, 502 F.2d 370, 373 (D.C. Cir. 1974) (holding that administrative findings have the "salient characteristics of 'law enforcement' contemplated by Exemption 7"); *Baltimore Sun v. United States Marshals Serv.*, 131 F. Supp. 2d 725, 728 n.2 (D. Md. 2001) (holding that USMS satisfies exemption 7 threshold because USMS is responsible for the "enforcement of civil and criminal seizure and forfeiture laws"); *Youngblood v. Comm'r*, No. 2:99-CV-9253-R (RNBX), 2000 WL 852449, at \*10 (C.D. Cal. Mar. 6, 2000) (explaining that IRS "investigations or proceedings in the civil or criminal context" satisfy the exemption 7 threshold); *McErlean v. United States Dep't of Justice*, No. 97 CIV. 7831(BSJ), 1999 WL 791680, at \*8 (S.D.N.Y. Sept. 30, 1999) ("It is well-settled that documents compiled by the INS in connection with the administrative proceedings authorized by the Immigration and Naturalization Act are documents compiled for 'law enforcement purposes' . . ."); *Johnson v. DEA*, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at \*9 (D.D.C. June 25, 1998) ("The law being enforced may be . . . regulatory."). This fact is relevant regarding post-9/11 requests that could be withheld as a matter of regulatory investigation by the INS or another administrative agency. Also of considerable significance, there is no requirement that the law enforcement matter end with an administrative, civil, or criminal enforcement. *See Ponder v. Reno*, No. 98-3097, slip op. at 5 (D.D.C. Jan. 22, 2001) (stating that records were compiled for law enforcement purposes even though the subject was never prosecuted); *Goldstein v. Office of Indep. Counsel*, No. CIV. A. 87-2028TPJJM, 1999 WL 570862, at \*8-9 (D.D.C. July 29, 1999) (explaining that an investigation of an individual for criminal violations was for a law enforcement purpose even if the investigation "went nowhere").

sought curtailment of FOIA, especially exemption 7.<sup>55</sup> The central piece of the Administration's effort to rework the FOIA exemption 7 was a memorandum by Attorney General Edwin Meese, III.<sup>56</sup> The lengthy memorandum elaborated on the exemption 7 expanded language, stated that "all federal agencies should also reassess the extent to which their records may now qualify for possible exemption 7 protection[.]"<sup>57</sup> and reinforced the fact that "agencies should be mindful of the greater latitude that is now inherent in these major law enforcement exemptions."<sup>58</sup> The Supreme Court expanded law enforcement agencies' protection even further in 1990, holding that information that may not initially have been obtained for law enforcement purposes may still qualify under exemption 7 if it is subsequently compiled for a law enforcement purpose at any point prior to "when the [g]overnment invokes the [e]xemption."<sup>59</sup>

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<sup>55</sup> See Statement on signing the Anti-Drug Abuse Act of 1986, 2 PUB. PAPERS 1452 (Oct. 27, 1986). President Reagan stated:

This Act contains several important provisions reforming the Freedom of Information Act (FOIA) that will considerably enhance the ability of Federal law enforcement agencies, such as the Federal Bureau of Investigation and the Drug Enforcement Administration, to combat drug offenders and other criminals. My Administration has been seeking such reforms since 1981.

These FOIA reforms substantially broaden the law enforcement exemptions in that act, thereby increasing significantly the authority of Federal agencies to withhold sensitive law enforcement documents in their files. The statutory language changes make clear, for example, that any Federal law enforcement information relating to pending investigations or confidential sources may be withheld if its disclosure could reasonably be expected to cause an identified harm.

*Id.*

<sup>56</sup> Meese, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989); *see also* *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir. 1990) (applying *John Doe Agency* so information from a personnel interview conducted before an investigation commenced but later compiled for law enforcement purposes satisfied exemption 7); *Kansi v. United States Dep't of Justice*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998) (pointing out that once documents are at some point assembled for law enforcement purposes, the documents qualify for exemption 7 protection regardless of their original source). This decision resolved the conflict of lower courts on whether something originally compiled for another purpose, but subsequently used in a law enforcement purpose could be protected. *Compare* *Corwell & Moring v. Dep't of Def.*, 703 F. Supp. 1004, 1009–10 (D.D.C. 1989) (explaining that solicitation and contract bids may be protected), *with* *Hatcher v. United States Postal Service*, 556 F. Supp. 331, 335 (D.D.C. 1982) (stating that routine contract negotiation and oversight material is not protected from disclosure). *Compare* *Gould Inc. v. Gen. Servs. Admin.*, 688 F. Supp. 689, 691 (D.D.C. 1988) (explaining that routine audit reports may be protected), *with* *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 109 (2d Cir. 1988) (stating that routine audit reports are not protected).

### C. Clinton Administration Application

The Clinton Administration sought to curtail the depletion of FOIA disclosures.<sup>60</sup> With a memorandum written by Attorney General Janet Reno,<sup>61</sup> the Clinton Administration promoted greater disclosure and accountability on the part of the agencies.

The Clinton Administration's greatest FOIA impact, however, may have been the issuance of Executive Order 12,958.<sup>62</sup> The Order, which affects exemption 1 almost entirely, highlights the fact that information may not be classified unless its "disclosure . . . reasonably could be expected to result in damage to the national security . . ."<sup>63</sup> Courts, though, have continued to struggle with this language, giving deference to agency expertise and refusing to require actual articulation of a defined harm by an agency.<sup>64</sup> The Order, however, has no

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<sup>60</sup> After President Clinton stressed that FOIA "is a vital part of the participatory system of government"; "I am committed to enhancing [FOIA's] effectiveness in my Administration"; and "[o]penness in government is essential to accountability . . .", the President departed from the previous administration's policies, and advocated a new attitude regarding FOIA:

I therefore call upon all Federal departments and agencies to renew their commitment to the Freedom of Information Act, to its underlying principles of government openness, and to its sound administration. This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of Freedom of Information Act requests, and to conform agency practice to the new litigation guidance issued by the Attorney General, which is attached.

Further, I remind agencies that our commitment to openness requires more than merely responding to requests from the public. Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems. Taking these steps will ensure compliance with both the letter and spirit of the Act.

William J. Clinton, Memorandum for Heads of Departments and Agencies (Oct. 4, 1993), available at [http://www.usdoj.gov/04foia/93\\_clntmem.htm](http://www.usdoj.gov/04foia/93_clntmem.htm).

<sup>61</sup> See Janet Reno, Memorandum for Heads of Departments and Agencies (Oct. 4, 1993) [hereinafter Reno Memo], reprinted in LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS A-35 (Allan R. Adler ed., 20th ed. 1997).

<sup>62</sup> Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 20, 1995).

<sup>63</sup> *Id.* § 1.2(a)(4).

<sup>64</sup> See *Nat'l Sec. Archive v. CIA*, No. 99-1160, slip op. at 8 (D.D.C. July 31, 2000) ("Agencies have more experience in the national security arena than courts do, and therefore their judgment warrants deference as long as the agency can demonstrate a logical connection between a withheld document and an alleged harm to national security."); *Aftergood v. CIA*, No. 98-2107, 1999 U.S. Dist. LEXIS 18135, at \*9 (D.D.C. Nov. 12, 1999) ("[T]he law does not require certainty or a showing of harm . . ."); *id.* at \*9-10 (suggesting that courts must respect agency predictions concerning any potential national security harm because predictions "must always be speculative to some extent").

presumption of classification in any of the defined categories,<sup>65</sup> so any classification must be made at the discretion of an agency assessing the potential harm to national security.<sup>66</sup>

The Reno Memo clearly altered the Reagan Administration guidelines, under which an agency could scrutinize FOIA requests and deny requests if there was a "substantial legal basis."<sup>67</sup> Under the new standard, an agency was instructed to "defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."<sup>68</sup> Agencies, thus, were unable to withhold disclosure by suggesting the information could fall within an exemption,<sup>69</sup> and there was to be a "presumption of disclosure" with all requests.<sup>70</sup>

Despite the Clinton Administration's earnest efforts,<sup>71</sup> most government agencies are able to classify material at their discretion and courts continue to be

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<sup>65</sup> See Exec. Order No. 12,958, 60 Fed. Reg. at 19,825. The categories that can be proper bases for classification under section 1.5 of Executive Order 12,958 are: foreign government information, vulnerabilities or capabilities of systems, installations, projects, or plans relating to national security, intelligence activities, sources or methods, cryptology, foreign relations or foreign activities, confidential sources, military plans, weapons, operations, scientific, technological, or economic matters relating to national security, and government programs for safeguarding nuclear materials and facilities. See DEP'T OF JUSTICE, *supra* note 50.

<sup>66</sup> See O'REILLY, *supra* note 32, § 11:15, at 529 ("Classification systems are the procedural framework within which agencies make discretionary choices about what to classify and at what level of secrecy. Courts accord great deference to the opinions of foreign or military affairs agencies that disclosure may cause serious security harms or revelation of clandestine sources.").

<sup>67</sup> See Letter of Attorney General William French Smith to All Federal Departments and Agencies (May 5, 1981), cited in Christopher M. Mason, Note, *Developments Under the Freedom of Information Act—1981*, 1982 DUKE L.J. 423, 425 n.17 (1982).

<sup>68</sup> Reno Memo, *supra* note 61, at A-35.

<sup>69</sup> See Michael M. Lowe, Note, *The Freedom of Information Act in 1993–94*, 43 DUKE L.J. 1282, 1314 (1994).

<sup>70</sup> Reno Memo, *supra* note 61, at A-35. The Reno Memo also required that agencies review their own internal regulations regarding FOIA and provide an annual report to Congress on their FOIA figures. *Id.* at A-36.

<sup>71</sup> Executive Order 12,958 allows classification determinations to be challenged within the government. 60 Fed. Reg. 19825, 19830 (April 20, 1995) (referring to section 1.9). The Order also stipulates that material must adhere to the procedural requirements in order to become classified. Exec. Order No. 12,958, 60 Fed. Reg. at 19827–28 (referring to sections 1.6 and 1.7). Additionally, the Order requires that a concise reason for classification must be stated, and that the declassification date must be specified on the document. Executive Order 12,958, 60 Fed. Reg. at 19,828 (referring to sections 1.7(a)(5) and 1.7(a)(4)). Finally, Executive Order 12,958 provides oversight of classification decisions by the Interagency Security Classification Appeals Panel. 60 Fed. Reg. at 19,839, (referring to 5.4(a)(1)). See O'REILLY, *supra* note 32, § 11:13, at 528 (describing Executive Order 12,958 as "a pro-disclosure order when compared with its

extremely deferential to these determinations.<sup>72</sup> The Bush Administration may be reviewing the Order and considering issuing a new Executive Order.<sup>73</sup>

#### IV. The BUSH ADMINISTRATION'S "CHANGES" TO FOIA AFTER SEPTEMBER 11TH

The attitude and position on FOIA requests shifted, whether slightly or significantly, during the Ford, Carter, Reagan, and Clinton Administrations. It is speculative as to whether the current Bush Administration would have altered FOIA guidelines, as some have suggested, had the 9/11 disaster never occurred.<sup>74</sup>

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predecessors from the Republican administrations that preceded it. The 1995 Order's terms are more demanding of the agency than the prior orders, so agencies must show more detail about describing the damage to national security, in order to prevail"); *see also* Lowe, *supra* note 69, at 1313 (pointing out that the President's and Attorney General's Memos "demonstrated the Clinton administration's desire to instill in federal agencies a more receptive attitude toward FOIA requests."). *But see* Paul McMasters, "FOIA, It's Always There," SOCIETY OF PROFESSIONAL JOURNALISTS QUILL (Oct. 1996), at [http://www.spj.org/foia\\_history.asp](http://www.spj.org/foia_history.asp) ("While praising these developments, [Professor Jane] Kirtley pointed out that the Clinton administration's record on access is spotted. The Reporters Committee compiles an annual report on restricting access to government information. The 1996 report lists hundreds of instances when the public or press was denied access.").

<sup>72</sup> *See supra* notes 41 and 45; O'REILLY, *supra* note 32, § 11:12, at 528 ("The government has won virtually all exemption (b)(1) cases [even during and after the Clinton Administration], in large part because the executive orders are so readily available to agencies that want to keep an item secret."); Karen L. Turner, Comment, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation*, 33 MCGEORGE L. REV. 593, 610 (2002) ("[G]overnment agencies may withhold information for purposes of national security, a decision often subject to the determination of the agency itself."). McMasters explains:

With a few exceptions, court decisions have tended to favor the point of view of the agencies, especially in cases involving personal privacy and national security, according to Harry Hammitt, editor of *Access Reports* and a long-time chronicler of FOI legislation and court cases. "The courts always start off their decisions with lip-service about the FOIA being a disclosure law and that the exemptions should be construed narrowly, then they go ahead and give away the store to the government," said Hammitt.

McMasters, *supra* note 71.

<sup>73</sup> *See* William J. Broad, *U.S. is Still Selling Reports on Making Biological Weapons*, N.Y. TIMES, Jan. 13, 2002, at A1 (quoting Steven Garfinkel, former Information Security Oversight Office Director, who reported that a new executive order is under consideration).

<sup>74</sup> *See* Ellen Nakashima, *Bush View of Secrecy is Stirring Frustration*, WASH. POST, Mar. 3, 2002, at A4 (stating that there was an "[Ashcroft] memo—in the works long before the terrorist attacks"); Drew Clark, 'Open Records' Advocates Criticize Administration's Strategy, NAT'L J. TECH. DAILY, Sept. 13, 2002 ("Sean Moulton, senior policy analyst at OMB Watch, said 'the Bush administration's predisposition for secrecy' existed well before the Sept. 11, 2001, terrorist attacks."); *Profile: Bush Administration's Handling of the Release of Information*



As noted earlier, the September 11th tragedies changed the world landscape and emphasis on homeland security in monumental ways.<sup>75</sup> The centerpiece of the Bush Administration's change in the direction of FOIA releases was Attorney General John Ashcroft's memorandum issued on October 12 [hereinafter Ashcroft Memo].

### A. Attorney General Ashcroft's October 12 Memorandum

The Ashcroft Memo<sup>76</sup> was one measure among many to tighten security and decrease the possibility of sinister use of government information. Of greatest

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to *Public Interest Groups* (NPR News, Mar. 25, 2002) [hereinafter *Profile*] ("David Vladeck is the director of the Public Citizen Litigation Group. He says the government began tightening the flow of information before September 11th.").

<sup>75</sup> See e.g., *supra* note 17.

<sup>76</sup> John Ashcroft, Memorandum for Heads of All Federal Departments and Agencies (Oct. 12, 2001) [hereinafter Ashcroft Memo], at <http://www.usdoj.gov/04foia/011012.htm>. The Ashcroft Memo, in pertinent part, states:

MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

FROM: John Ashcroft, Attorney General

SUBJECT: The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The Department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil

significance in the memo is that it trumps the Reno Memo of 1993,<sup>77</sup> and establishes a “sound legal basis” standard needed to defend the withholding of information in a FOIA request.<sup>78</sup> It also urges each agency to consider the “values and interests”<sup>79</sup> of protecting our “fundamental values,”<sup>80</sup> an implicit reference to homeland protection. While the Justice Department has recognized this memorandum as a shift in overall FOIA policy,<sup>81</sup> the statutory language has not changed.

This new FOIA standard, bearing close resemblance to the Reagan Administration’s standard of a “substantial legal basis,”<sup>82</sup> has been sharply criticized. Many members of the media, legal scholars, and advocacy groups have complained that the Bush Administration is being much too secretive in disclosure requests and not living up to the obligations of FOIA.<sup>83</sup> One group

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Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice’s FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

*Id.* Such policy decisions must be made public per 5 U.S.C. § 552(a)(2)(B).

<sup>77</sup> See James V. Grimaldi, *At Justice, Freedom Not to Release Information*, WASH. POST, Dec. 2, 2002, at E1 (“It is not that the Reno Justice Department was particularly enamored with FOIA. But at least attorneys didn’t have carte blanche to disregard the law [as Mr. Grimaldi suggests they do under the Ashcroft Memo].”).

<sup>78</sup> Ashcroft Memo, *supra* note 76, para. 5.

<sup>79</sup> *Id.* at para. 4.

<sup>80</sup> *Id.* at para. 2.

<sup>81</sup> See DEP’T OF JUSTICE, *supra* note 50, at 4 (“The Ashcroft FOIA Memorandum establishes a ‘sound legal basis’ standard . . . . Under this new standard, agencies should reach the judgment that their use of a FOIA exemption is on sound footing, both factually and legally, whenever they withhold requested information.”); see also Timothy W. Maier, *Bush Team Thumbs its Nose at FOIA*, INSIGHT ON THE NEWS, Apr. 29, 2002, at 20 (“[The Ashcroft Memo is] an indication to agencies to be more aggressive in denying FOIA requests and not be concerned about going to court,” says American University Washington College of Law Professor Robert Vaughn.”).

<sup>82</sup> See Letter of Attorney General William French Smith, *supra* note 67; see also Harry Hammitt, *The Freedom of Information Center Turning Back the Hands of Time*, at <http://foi.missouri.edu/terrorismfoi/turningbk.html> (last updated Nov. 20, 2001) (“While heightened national security and law enforcement interests stemming from the Sept. 11 terrorist attack are implicit in the substance of the [Ashcroft] memo, it was in preparation before that time and reflects a movement back to the policy of the Reagan administration.”).

<sup>83</sup> See The Reporter’s Committee for Freedom of the Press, *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know*, at <http://www.rcfp.org/homefrontconfidential/foi.html> (last visited Nov. 20, 2003) (ranking FOI as

spokesman suggested, “The Bush administration is mounting the most sustained assault on open government since the early Reagan administration or perhaps even since President Gerald Ford vetoed the FOIA amendments in 1974.”<sup>84</sup>

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“severe[ly]” threatened by anti-terrorism measures); Turner, *supra* note 72, at 610–11 (stating that the Ashcroft Memo places additional considerations for a FOIA request which are not delineated in the statutory language which “is in direct conflict with the stated purpose of the Act”); Nakashima, *supra* note 74, at A4 (“[U]nder FOIA, the 36-year-old cornerstone law for government transparency, the reluctance to provide information has become routine throughout the administration, liberal and conservative public interest groups say. They say it is a gathering trend, fed by, but not rooted in, the Sept. 11 terrorist attacks.”); Maier, *supra* note 81, at 20 (“The [Ashcroft] memorandum created a level of secrecy unsurpassed since FOIA became law in 1966.”); John Giuffo, *The FOIA Fight*, Columbia Journalism Review Online Report (reporting that more limited disclosure was the subject of several panel discussions in Philadelphia in March 2002), at <http://www.cjr.org/year/02/2/giuffoFOIA.asp> (last visited Oct. 3, 2003).

The Administration has also issued Executive Order 13,233, which enhances executive privilege and blocks public access to federal records created during the administration—another act which has diminished the public’s access to federal documents. Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 5, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011101-12.html>; See Marcy Lynn Karin, Note, *Out of Sight, But Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529 (2002) (making a critical evaluation of the Order, suggesting that the legislative and judicial branches are better suited to decide executive privilege matters than the executive).

<sup>84</sup> Maier, *supra* note 81, at 20 (quoting Tom Blanton, director of the nonpartisan National Security Archives at George Washington University). Many other organizations, journalists, and scholars have agreed with such criticisms:

You have an administration that is harkening back to the Nixon era, which believes that they should not be transparent at all, that things should be secret, they should be hidden. And while there may be some argument to be secret when it comes to fighting terrorism, there’s no argument to be made when it comes to formulating energy policy [regarding the controversy over information related to the energy task force, led by Vice President Cheney].

*Profile*, *supra* note 74 (quoting Larry Klayman of “Judicial Watch”); see also Laura Parker et al., *Secure Often Means Secret: Post-9/11, Government Stingy with Information*, USA TODAY, May 16, 2002, at 1A (“[S]ince the terrorist attacks Sept. 11, the Bush administration has moved more quickly than any administration since World War II to make government activities, documents and other information secret, liberals and conservatives say.”); Press Release, Society of Professional Journalists, SPJ Asks Ashcroft Not to Stonewall Requests for Public Information (Oct. 19, 2001), available at <http://www.spj.org/news.asp?ref=41>. The press release reported:

[Society of Professional Journalists] leaders sent Ashcroft a letter expressing alarm over a memorandum he issued this week.

....

In the letter, SPJ said that it supports keeping government records secret when the threat is credible and the link to the information is clear. However, in Ashcroft’s statement, SPJ

The Ashcroft Memo affirms that the administration is “committed to full compliance with the Freedom of Information Act,” but the thrust of the entire Memo is that the interests of disclosure and open government must be balanced with the “other fundamental values that are held by our society,” namely public protection.<sup>85</sup> While academics, advocacy groups, and the press express outrage at the recent measures to curtail transparent government, the general public is not that concerned.<sup>86</sup> President Bush’s approval ratings have remained high since 9/11, so his constituents seem pleased with his decisions and the overall atmosphere the Administration has set.<sup>87</sup> The White House has pointed out that the press’s outlook and the public’s outlook on the matter are not congruent.<sup>88</sup>

The “sound legal basis” standard, while a shift from the language of the Reno Memo, has not thrown FOIA to the four winds. The Bush Administration has the very difficult task of promoting homeland protection while not offending the sacred principles of our democracy.<sup>89</sup> The Ashcroft Memo, like all Attorney General memos, may be a shift in policy for our current environment, but the

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said the attorney general alluded to purposeful stonewalling and delay in obtaining public information.

*Id.*

<sup>85</sup> Ashcroft Memo, *supra* note 76, para. 2.; *see also supra* notes 15 and 16 and accompanying text concerning how open government must be balanced with the interests of protection.

<sup>86</sup> *See* Mark Tapscott, *Too Many Secrets*, WASH. POST, Nov. 20, 2002, at A25. In his article, Mr. Tapscott stated:

Admittedly, insisting that the public’s business be done in public isn’t a popular cause these days. Recent surveys show that many Americans are willing to trade significant chunks of their First Amendment rights for the promise of greater security in the war on terrorism. Such surveys must gladden the hearts of Bush administration officials . . .

*Id.*

<sup>87</sup> *See, e.g.,* Gallup Org., *Gallup Poll: Bush Approval Rating Stabilizes at 63%*, Jun. 20, 2003, available at <http://www.gallup.com/poll/releases/pr030620.asp> (putting Bush’s approval rating at 63 percent). This website gives a chronological history of the President’s approval rating, showing that his highest approval rating was 90% in September of 2001, and his lowest was 57% in February 2003. *See id.*

<sup>88</sup> *See* Maier, *supra* note 81, at 20.

White House spokesman Ari Fleischer has responded to press complaints about the growing secrecy by saying that the media are not on the same page as the public. ‘The press is asking a lot of questions that I suspect the American people would prefer not to be asked or answered,’ he said.

*Id.*

<sup>89</sup> *See supra* notes 15 and 16 and accompanying text.

guidelines and spirit of FOIA have not been diminished.<sup>90</sup> It must be bore in mind that most who write about the status of FOIA, namely the press and advocacy groups, often have a built-in bias toward greater disclosure. It is difficult to get an objective opinion on whether there has been an actual tightening down of FOIA releases. On one side the press is writing that secrecy has increased.<sup>91</sup> On the other side, the government, who will obviously defend its own policies, says that there has been little change and that it is still completely complying with FOIA.<sup>92</sup> The Bush Administration has made a policy move that is quite defensible and should be deferred to during this volatile time of combating terrorism, dealing with Iraq, and overall Middle East turbulence.

### B. Chief of Staff Card's March 19th Memo

The other major piece of policy formulation to come out of the executive branch regarding the FOIA was a memorandum issued by White House Chief of Staff Andrew Card [hereinafter Card Memo],<sup>93</sup> along with the attached guidance

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<sup>90</sup> Former Head of the Information Security Oversight Office, Steven Garfinkel, stated:

Oh, the memo didn't change the rules. The law stayed the same, and those are basically the rules. The memo just deals with whether or not the Justice Department is going to support you in particular cases, and I found that that's largely rhetoric. If you have a good case, the Justice Department will support you. And you should be inclined to comply with the law and release information unless there's a very good reason not to.

*Profile*, *supra* note 74.; *see also* The Reporter's Committee for Freedom of the Press, *supra* note 83 ("Dan Metcalfe, co-director of the Justice department's Office of Information and Privacy, said the change in instructions from Reno to Ashcroft did not represent a 'drastic' shift in the government's FOI policies as many have claimed.").

<sup>91</sup> *See supra* notes 83–84 and accompanying text.

<sup>92</sup> *See supra* note 90 and accompanying text. It is also implicit in the Ashcroft Memo, *supra* note 76, that FOIA is still being completely complied with.

<sup>93</sup> The relevant portions of White House Chief of Staff Andrew Card's March 19, 2002, memorandum are included [hereinafter Card Memo]:

At the request of the Assistant to the President and Chief of Staff, we have prepared this memorandum to provide guidance for reviewing Government information regarding weapons of mass destruction, as well as other information that could be misused to harm the security of our nation or threaten public safety. It is appropriate that all federal departments and agencies consider the need to safeguard such information on an ongoing basis and also upon receipt of any request for records containing such information that is made under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). Consistent with existing law and policy, the appropriate steps for safeguarding such information will vary according to the sensitivity of the information involved and whether the information currently is classified.

#### I. Classified Information

If the information currently is classified and is equal to or less than 25 years old, it should remain classified in accordance with Executive Order 12958, Sec. 1.5 and Sec. 1.6.

on March 19, 2002. The Card Memo contained the Acting Director of the Information Security Oversight Office and the Co-Directors of the Justice Department's Office of Information and Privacy's prepared guidance regarding

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Although classified information generally must be declassified within 10 years of its original classification, classification or reclassification may be extended for up to 25 years in the case of information that could reasonably be expected to "reveal information that would assist in the development or use of weapons of mass destruction." *Id.*, Sec. 1.6(d)(2).

If the information is more than 25 years old and is still classified, it should remain classified in accordance with Executive Order 12958, Sec. 3.4(b)(2), which authorizes agency heads to exempt from automatic declassification any "specific information, the release of which should be expected to . . . reveal information that would assist in the development or use of weapons of mass destruction."

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## II. Previously Unclassified or Declassified Information

If the information, regardless of age, never was classified and never was disclosed to the public under proper authority, but it could reasonably be expected to assist in the development or use of weapons of mass destruction, it should be classified in accordance with Executive Order 12958, Part 1, subject to the provisions of Sec. 1.8(d) if the information has been the subject of an access demand (or Sec 6.1(a) if the information concerns nuclear or radiological weapons).

If such sensitive information, regardless of age, was classified and subsequently was declassified, but it never was disclosed to the public under proper authority, it should be reclassified in accordance with Executive Order 12958, Part 1, subject to the provisions of Sec. 1.8(d) if the information has been the subject of an access demand (or Sec 6.1(a) if the information concerns nuclear or radiological weapons).

## III. Sensitive But Unclassified Information

In addition to information that could reasonably be expected to assist in the development or use of weapons of mass destruction, which should be classified or reclassified as described in Parts I and II above, departments and agencies maintain and control sensitive information related to America's homeland security that might not meet one or more of the standards for classification set forth in Part 1 of Executive Order 12958. The need to protect such sensitive information from inappropriate disclosure should be carefully considered, on a case-by-case basis, together with the benefits that result from the open and efficient exchange of scientific, technical, and like information.

All departments and agencies should ensure that in taking necessary and appropriate actions to safeguard sensitive but unclassified information related to America's homeland security, they process any Freedom of Information Act request for records containing such information in accordance with the Attorney General's FOIA Memorandum of October 12, 2001, by giving full and careful consideration to all applicable FOIA exemptions. . . .

As the accompanying memorandum from the Assistant to the President and Chief of Staff indicates, federal departments and agencies should not hesitate to consult with the Office of Information and Privacy, either with general anticipatory questions or on a case-by-case basis as particular matters arise, regarding any FOIA-related homeland security issue.

information release. The main themes were actions to be taken with classified information and "sensitive but unclassified information."<sup>94</sup>

Regarding classified information, the Card Memo reaffirms the classification policies that were articulated in Executive Order 12,958 under the Clinton Administration, but extends some of the classification status within the parameters of what the Order allowed.<sup>95</sup> There seems to be less controversy concerning these decisions, since they relate to weapons of mass destruction and have a more defined connection to national security. Of greater concern is that "departments and agencies maintain and control sensitive information related to America's homeland security"<sup>96</sup> even if the information cannot be clearly protected under Executive Order 12,958.<sup>97</sup> This stance seems to allow agencies to make their own determinations of what is too "sensitive" for release.<sup>98</sup>

Anytime there is a term or phrase that must be interpreted, there can be cause for concern. The "sensitive but unclassified" declaration, however, is not out of line with the spirit of FOIA considering present security concerns. FOIA offices, most importantly those in the Justice Department, have agency expertise on what subjects are "sensitive" and what are not.<sup>99</sup> There will be borderline cases, and this new guidance seems to indicate that those situations may favor non-disclosure, but such a conclusion is justified because the administration must take steps to deter the threat of terrorism.<sup>100</sup> If, in the estimation of the government

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<sup>94</sup> *Id.*

<sup>95</sup> Notably, information that is more than twenty-five years old, which would have been subject to automatic declassification, should remain classified if it could reasonably be used to produce weapons of mass destruction, and information that was previously declassified but never released to public should be reclassified if it could reasonably be expected to assist to create weapons of mass destruction. Exec. Order 12,958, 60 Fed. Reg. 19,825, at 19,833, 19,829 (Apr. 20, 1995) (referring to sections 3.4(b)(2) and 1.8(d), respectively).

<sup>96</sup> Card Memo, *supra* note 93.

<sup>97</sup> See *supra* note 95.

<sup>98</sup> See Clark, *supra* note 74 (voicing concerns about the Card Memo, "The 'sensitive' standard is not defined by FOIA and hence is subject to widely varying interpretations. . . . 'A more precise and definitive approach' is necessary" said Sean Moulton, senior policy analyst at OMB Watch).

<sup>99</sup> For a listing of FOIA offices at all federal agencies, see <http://www.usdoj.gov/04foia/foiacontacts.htm> (last visited Oct. 3, 2003).

<sup>100</sup> The Homeland Security Advisory System, a means to disseminate information regarding the risk of terrorist acts, has oscillated between a rating of "Elevated" and "High." For the current threat level, see <http://www.whitehouse.gov/homeland>; see also, e.g., Ashcroft, Ridge, Mueller Announce Threat-level Increase (Feb. 7, 2003), at <http://www.cnn.com/2003/US/02/07/threat.transcript/index.html> (pointing out that the decision to increase the threat level to "high" was based on "specific intelligence received and analyzed by the full intelligence community" and that the "al Qaeda terrorist network [is] still determined to attack innocent Americans . . .").

agencies, some information is too sensitive, they should have the means to withhold it from being disclosed.

V. AN INITIAL CASE STUDY: *CENTER FOR NATIONAL SECURITY STUDIES V. DEP'T OF JUSTICE*

One of the first cases to deal with post-9/11 FOIA issues was the D.C. Circuit's *Center for National Security Studies v. United States Department of Justice*, decided on June 17, 2003.<sup>101</sup> In this case, the plaintiffs sought disclosure under FOIA for the names and circumstances of individuals detained after the September 11th terrorist attacks, while the Department of Justice asserted the requested information to be exempt under exemption 7.<sup>102</sup> It is an immensely significant case because it indicates a shift toward greater judicial deference regarding FOIA requests with the post-9/11 emphasis on homeland security.

A. *Factual Background*

The plaintiffs in the case were the Center for National Security Studies, the American Civil Liberties Union, and twenty-one other public interest organizations.<sup>103</sup> After the government did not voluntarily release the information, the plaintiffs made a FOIA request on October 29, 2001, asking for: (1) the identities of each detainee (including circumstances of detention and any charges brought against them),<sup>104</sup> (2) the identities of any of the individual detainees' lawyers,<sup>105</sup> (3) the identities of courts that have been requested to enter

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<sup>101</sup> 331 F.3d 918 (D.C. Cir. 2003) [hereinafter *Ctr. for Nat'l Sec. Studies II*, to distinguish it from the district court decision of the same name]. The district court for the District of Columbia is the one court that always has jurisdiction to enjoin FOIA denials; other courts with jurisdiction would be where the complainant resides, has principal place of business, or where the agency records reside. See 5 U.S.C. § 552(a)(4)(B) (2000).

<sup>102</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 922.

<sup>103</sup> *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 215 F. Supp. 2d 94, 95 (D.D.C. 2002) [hereinafter *Ctr. for Nat'l Sec. Studies I*, to distinguish it from the appellate court decision]. The other plaintiffs included: Electronic Privacy Information Center, American-Arab Anti-Discrimination Committee, American Immigration Law Foundation, American Immigration Lawyers Association, Amnesty International USA, Arab-American Institute, Asian-American Legal Defense and Education Fund, Center for Constitutional Rights, Center for Democracy and Technology, Council on American Islamic Relations, First Amendment Foundation, Human Rights Watch, Multiracial Activist, Nation Magazine, National Association of Criminal Defense Lawyers, National Black Police Association, Inc., Partnership for Civil Justice, Inc., People for the American Way Foundation, Reporters Committee for Freedom of the Press, and the World Organization Against Torture USA.

<sup>104</sup> *Id.* at 97.

<sup>105</sup> *Id.*



orders sealing proceedings of the individual detainees,<sup>106</sup> and (4) all policy directives issued to federal officials on disclosure about the detainees or about the sealing of proceedings.<sup>107</sup> The FBI responded to the request by stating that all of the material would be withheld pursuant to exemption 7 of FOIA; upon the initial agency appeal, the FBI affirmed its denial under exemptions 7(A), 7(C), and 7(F).<sup>108</sup>

Those arrested and detained fell into one of three categories: (1) immigration-related charges by the INS, (2) persons charged with federal crimes, and (3) persons held on material witness warrants.<sup>109</sup> For the over 700 individuals held on immigration charges, the government revealed place of birth and citizenship for most of them,<sup>110</sup> but withheld their names, dates and locations of detention or arrest, dates of release, and names of lawyers.<sup>111</sup> One-hundred thirty-four individuals were detained on federal criminal charges.<sup>112</sup> Although many of the convictions could have been described as "terrorism-related crimes," only one detainee was connected to the September 11th attacks.<sup>113</sup> The government released most of the information on these detainees, but withheld information on the dates and locations of arrest along with dates and locations of detention.<sup>114</sup> The government withheld all information regarding those held as material witnesses.<sup>115</sup> Regarding the request for policy directives, the government provided only two documents (one heavily redacted).<sup>116</sup> Importantly, the D.C.

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 98. The exemptions cover:

[R]ecords of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7) (2000).

<sup>109</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 921.

<sup>110</sup> *Ctr. for Nat'l Sec. Studies I*, 215 F. Supp. 2d at 97.

<sup>111</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 922.

<sup>112</sup> *Id.* at 921.

<sup>113</sup> *Id.* The one individual charged in connection with the September 11th attacks was Zaccharias Moussaoui. See *Ctr. for Nat'l Sec. Studies I*, 215 F. Supp. 2d at 98 n.6; see also Jerry Markon, VA Appeals Court May Surprise in Terror Case; Despite Pro-Government, Conservative Reputation, Moussaoui Panel Could Go Either Way, WASH. POST, June 5, 2003, at A16 ("Moussaoui was charged in December 2001 with conspiring with al Qaeda members to hijack the airplanes that crashed into the World Trade Center and the Pentagon.").

<sup>114</sup> *Ctr. for Nat'l Sec. Studies I*, 215 F. Supp. 2d at 99.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Circuit noted that “each of the detainees has had access to counsel, access to courts, and freedom to contact the press or the public at large.”<sup>117</sup>

## B. Court Discussion and Conclusions

The district court held that the government must release the identities of the individuals detained and the detainees’ lawyers.<sup>118</sup> It did not believe that the government had established the “rational link” between disclosure and the alleged harms.<sup>119</sup> The government, in the district court’s view, only speculated that the detainees *could* be connected to terrorist activities and, as such, requested an untenable stretch of the exemption’s coverage.<sup>120</sup>

### 1. Majority Opinion: Considerable Deference

The D.C. Circuit reversed the lower court’s order that the names must be disclosed, and concluded that: (1) the government could withhold the identities of the individuals detained,<sup>121</sup> (2) the government could properly withhold the dates and locations of arrest, detention, and release,<sup>122</sup> and (3) the government could withhold the identities of the detainees’ lawyers.<sup>123</sup>

As a threshold issue, the court quickly noted that the information under question was definitely compiled for law enforcement purposes, so the exemption 7 subparts would apply.<sup>124</sup> Since the court concluded the

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<sup>117</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 922.

<sup>118</sup> *Ctr. for Nat’l Sec. Studies I*, 215 F. Supp. 2d at 113–14.

<sup>119</sup> *Id.* at 102. The district court cited *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) for the need of such a “rational link.” “Therefore, in the absence of an allegation of ‘reasonable specificity’ that detainees have a connection to terrorism, the Government’s concern that disclosure would deter cooperation and impair its investigation is pure speculation, and, with respect to the INS detainees, is actually belied by the record.” *Id.* at 103.

<sup>120</sup> *Id.* at 102. The court forcefully noted:

[T]he Court has uncovered no FOIA case that would permit the Government to do what it wants to do here: withhold information simply because of the possibility, however remote, that the detainees (even those who have been released) have information that might, at a later date, aid the Government’s intelligence gathering and law enforcement efforts.

*Id.* at 102 n.12.

<sup>121</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 932.

<sup>122</sup> *Id.* at 933.

<sup>123</sup> *Id.* at 932–33.

<sup>124</sup> *Id.* at 926. “The names have been compiled for the ‘law enforcement purpose’ of successfully prosecuting the terrorism investigation. As compiled, they constitute a

exemption 7(A) subpart sufficient for withholding the information, it did not analyze the 7(C) or 7(F) sections at all.<sup>125</sup>

The overwhelming theme that runs throughout the D.C. Circuit Court's opinion is one of deference to law enforcement agencies' judgment regarding the potential harm of releasing the requested identities.<sup>126</sup> When beginning the consideration of whether disclosure would "reasonably be expected to interfere with enforcement proceedings[.]"<sup>127</sup> the court stated it is "well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview."<sup>128</sup> The court then invoked Supreme Court precedent for this principle,<sup>129</sup> as well as its own previous FOIA cases.<sup>130</sup> It should be noted that the Federal District Court for the District of Columbia and the D.C. Circuit Court of Appeals handle the highest number of FOIA appeals concerning federal agencies because the statute provides the district jurisdiction for an appeal of a denial by a defendant agency.<sup>131</sup>

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comprehensive diagram of the law enforcement investigation after September 11. Clearly this is information compiled for law enforcement purposes." *Id.*

<sup>125</sup> *Id.* at 925.

<sup>126</sup> *E.g., id.* at 926 ("The government's declarations, viewed in light of the appropriate deference to the executive on issues of national security, satisfy this burden.") In the majority's opinion, the word "deference" is explicitly used seventeen times, and is referenced as a concept throughout as well.

<sup>127</sup> 5 U.S.C. § 552(b)(7)(A) (2000).

<sup>128</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 926–27.

<sup>129</sup> *Id.* at 927 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001)) (" '[T]errorism or other special circumstances' might warrant 'heightened deference to the judgments of the political branches' "); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *CIA v. Sims*, 471 U.S. 159, 179 (1985) ("[T]he decisions of the [CIA] Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake.").

<sup>130</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 927 ("We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated."). The court cited several cases to substantiate this point: *King v. United States Dep't of Justice*, 830 F.2d 210, 217 (D.C. Cir. 1987) ("[T]he court owes substantial weight to detailed agency explanations in the national security context"); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (" '[T]he Executive departments[,] responsible for national defense and foreign policy matters[,] have unique insights into what adverse affects [sic] might occur as a result of a particular classified record.' " (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 12, 1974 U.S.C.C.A.N. 6267)); *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982) ("Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.").

<sup>131</sup> 5 U.S.C. § 552(a)(4)(B) (2000).

The court was quite sensitive to the national-security context and terrorism threat,<sup>132</sup> and this perspective seemed to drive its entire outlook on deferring to the government. The government sought and succeeded to justify withholding disclosure because of the threat that terrorist organizations would intimidate witnesses and would be able to see how the investigation was being conducted.<sup>133</sup> Such alleged harms were based on the affidavits of two federal terrorism specialists.<sup>134</sup> The court made the important point that whether the information “‘could reasonably be expected’ [to interfere with enforcement proceedings]” was ultimately a “predictive judgment” that either the agency or the court would have to make.<sup>135</sup> With this in mind, the court believed that this situation called for deference, stating that it was “‘abundantly clear that the government’s top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security.’”<sup>136</sup> The court was ultimately compelled to decide that disclosure of the detainees’ names would reasonably interfere with the investigation.<sup>137</sup> Likewise, the assertions of witness intimidation also justified withholding of the names.<sup>138</sup>

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<sup>132</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 928 (“America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”).

<sup>133</sup> *Ctr. for Nat’l Sec. I*, 215 F. Supp. 2d at 101–03.

<sup>134</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 923 (“In support of its motion, the government submitted affidavits from James Reynolds, Director of the Terrorism and Violent Crime Section of the Department of Justice, and Dale Watson, FBI Executive Assistant Director for Counterterrorism—officials with central responsibility for the ongoing terrorist investigation.”). The dissent highlights the fact that the Watson affidavit was prepared for other cases, dealing with closing deportation hearings, and that the harm discussed there was the release of evidence, not names. *Id.* at 941. Though the issue is not identical, the Watson declaration on the threat of publicly releasing information invokes the same principle and served a useful purpose for as much as the court wanted to reference it. For further discussion on the requirements concerning government affidavits for FOIA exemptions, see *Edmonds v. FBI*, 272 F. Supp. 2d 35, 44–45.

<sup>135</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 928.

<sup>136</sup> *Id.* (referencing *Krikorian v. Dep’t of State*, 984 F.2d 461, 464 (D.C. Cir. 1993) (“Judges . . . lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case.”)).

<sup>137</sup> *Id.* Specifically, the court believed that:

A complete list of names informing terrorists of every suspect detained by the government at any point during the September 11 investigation would give terrorist organizations a composite picture of the government investigation, and since these organizations would generally know the activities and locations of its members on or about September 11, disclosure would inform terrorists of both the substantive and geographic focus of the investigation. Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not. This information could allow terrorists to better evade the ongoing investigation and more easily formulate or revise

In order to allow the government to withhold the names, the court had to wrestle with the proper application of the “mosaic theory” to this exemption 7 setting.<sup>139</sup> The “mosaic” argument has commonly been persuasive with courts in the exemption 1 context, but never in exemption 7 cases<sup>140</sup>—a fact of which the

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counter-efforts. In short, the “records could reveal much about the focus and scope of the [agency’s] investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret.” (quoting *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996)).

*Id.* at 928.

<sup>138</sup> *Id.* at 929. The court stated that “[o]n numerous occasions, both the Supreme Court and this Court have found government declarations expressing the likelihood of witness intimidation and evidence tampering sufficient to justify withholding of witnesses’ names under Exemption 7(A).” *Id.* at 929 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239–42 (1978); *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 312–13 (D.C. Cir. 1988); *Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1542–43 (D.C. Cir. 1993); *Manna v. United States Dep’t of Justice* 51 F.3d 1158, 1165 (3d Cir. 1995); and *Swan v. SEC* 96 F.3d 498, 499–500 (D.C. Cir. 1996)).

<sup>139</sup> As the district court described it, the “mosaic theory”:

[A]rgues that no information may be disclosed because “bits and pieces of information that may appear innocuous in isolation, when assimilated with other information . . . will allow the organization to build a picture of the investigation and to thwart the government’s attempts to investigate and prevent terrorism.”

*Ctr. for Nat’l Sec. Studies I*, 215 F. Supp. 2d at 103 (citations omitted); see also O’REILLY, *supra* note 32, § 11:17, at 531 (describing the “jigsaw puzzle” argument).

<sup>140</sup> *Ctr. for Nat’l Sec. Studies I*, 215 F. Supp. 2d at 103 (citing, *Abbotts v. Nuclear Regulatory Commission*, 766 F.2d 604 (D.C. Cir. 1985)). Just a month before the D.C. Circuit reversed its decision in *Center for National Security Studies*, the D.C. District Court stated “It should be noted that this ‘special deference’ to the agency’s affidavits is unique to Exemption 1.” *ACLU v. Dep’t of Justice*, 265 F. Supp. 2d 20, 30 (D.D.C. 2003) (citations omitted). Interestingly, the district court stated that since exemption 1 cases receive “considerable deference” from courts, it was quite significant that the government did not rely on exemption 1. *Ctr. for Nat’l Sec. Studies I*, 215 F. Supp. 2d at 103. Regarding exemption 1 mosaic claims:

The nature of the intelligence business is to cumulate fragments from which useful conclusions may be drawn. So an agency can dress up a seemingly innocuous piece of data with the jigsaw argument, to protect it under the classification standards of the executive order.

Analysts of bits of data into a “mosaic” by skilled intelligence agents who may receive FOIA-released documents is a phenomenon which the courts accept as a basis for withholding of even fragmentary information [including the Circuit Court of Appeals for the District of Columbia].

O’REILLY, *supra* note 32, § 11:17, at 532 (citations omitted). See *Nat’l Sec. Archive v. FBI*, 759 F. Supp. 872, 877 (D.D.C. 1991).

dissent made a significant point.<sup>141</sup> The court invoked an unprecedented level of deference in extending the “mosaic theory” to exemption 7:

Just as we have deferred to the executive when it invokes FOIA Exemptions 1 and 3, we owe the same deference under Exemption 7(A) in appropriate cases, such as this one. Plaintiffs provide no valid reason why the general principle of deference to the executive on national security issues should apply under FOIA Exemption 3, as in *Sims* and *Halperin*, and Exemption 1, as in our earlier cases, but not under Exemption 7(A). Nor can we conceive of any reason to limit deference to the executive in its area of expertise to certain FOIA exemptions so long as the government’s declarations raise legitimate concerns that disclosure would impair national security.<sup>142</sup>

The majority believed that the principle of deference should not be limited in such a wooden fashion: “Judicial deference depends on the substance of the danger posed by disclosure—that is, harm to the national security—not the FOIA exemption invoked.”<sup>143</sup>

In displaying such considerable deference to the executive agencies, the *Center for National Security Studies* majority seemed reassured by other circuits’ holdings that appreciated the present homeland security situation and have, accordingly, deferred to the expertise of the executive branch.<sup>144</sup> Of special note

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<sup>141</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 939 (Tatel, J., dissenting) (“[W]e have never held that such heightened deference [to the government assertions in exemption 1 and 3 cases] is also appropriate in Exemption 7 cases.”).

<sup>142</sup> *Id.* at 927–28 (citations omitted). The court drew strength from *CIA v. Sims*, 471 U.S. 159 (1985), where the Supreme Court

cautioned that “bits and pieces” of data “may aid in piecing together bits or other information even when the individual piece is not of obvious importance in itself.” Thus, “what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.”

*Id.* at 178. The court also cited its own precedent from *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (“Things that did not make sense to the District Judge would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation’s intelligence-gathering capabilities from what these documents revealed about sources and methods.”). *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 929. The court held that such a danger was present in the current national security context. *Id.*

<sup>143</sup> *Id.* at 928.

<sup>144</sup> *Id.* at 932 (“In upholding the government’s invocation of Exemption 7(A), we observe that we are in accord with several federal courts that have wisely respected the executive’s judgment in prosecuting the national response to terrorism.” (citing *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); *Global Relief Found. v. O’Neill*, 315 F.3d 748 (7th Cir. 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002)). The notable exception to this trend is the Sixth Circuit in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002), discussed *infra* at notes

was *North Jersey Media Group v. Ashcroft*,<sup>145</sup> wherein the Third Circuit refused to probe intensely into the government's assertions, instead deferring to the government's expertise in recognizing a potential threat, in holding that the government may close deportation hearings.<sup>146</sup> Though these are not FOIA cases, they reflect the attitude of increased deference by courts to federal agencies in the matters of national security—thus, giving more leeway to FOIA exemptions 1 and/or 7 is not an anomaly.

In keeping with its theme of deference, the court held that the names of the detainees' attorneys could be withheld under exemption 7 because of the possibility that releasing the attorneys' information could lead to the development of a comprehensive list of all the detainees—the chief evil to be avoided.<sup>147</sup> The court “easily affirmed” the district court's ruling regarding the dates and locations of arrest, which were perhaps the most threatening pieces of information.<sup>148</sup>

The court also rejected plaintiff's claims of a First Amendment or common law right to disclosure of the detainees' names. In regard to the First Amendment, the court held that while there is a limited right of access to a criminal judicial proceeding,<sup>149</sup> that right does not extend to investigatory documents.<sup>150</sup> The court

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191–201 and accompanying text. The *Center for National Security Studies* majority simply stated it “[did] not find the Sixth Circuit's reasoning compelling . . .” *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 932.

<sup>145</sup> 308 F.3d 198 (3d Cir. 2002). As the *Center for National Security Studies* majority highlighted:

That court acknowledged that the representations of the Watson Declaration are to some degree speculative. But the court did not search for specific evidence that each of the INS detainees was involved in terrorism, nor did it embark on a probing analysis of whether the government's concerns were well-founded. Rather, it was “quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise. The court concluded: To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them. We think the Third Circuit's approach was correct and we follow it here.

*Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 932 (internal quotations and citations omitted).

<sup>146</sup> *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 220–21 (3d Cir. 2002).

<sup>147</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 933. The court reasoned:

[I]f such a list [of detainees, compiled after knowledge of their attorneys] fell into the hands of al Qaeda, the consequences could be disastrous. Having accepted the government's predictive judgments about the danger of disclosing a comprehensive list of detainees, we also defer to its prediction that disclosure of attorneys' names involves the same danger.

*Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 934.

then quickly dismissed the common law right of access, holding that even if the information sought was public information, "FOIA has displaced the common law right."<sup>151</sup>

## 2. Dissent: Closer Scrutiny and Not "All or Nothing"

Judge David Tatel provided several objections in a forceful dissent. First, he criticized the majority for essentially abdicating its role of sufficiently evaluating the exemptions claims and being much too deferential to the government's assertions.<sup>152</sup> While Judge Tatel he clearly, and notably, recognized the government's interest in the post-9/11 security environment,<sup>153</sup> he thought that the courts still had a substantial role to play in FOIA litigation and must inquire as to the sufficiency of the government's justifications.<sup>154</sup> He simply would not give as much leniency to the government's allegations as the majority did, believing

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<sup>150</sup> *Id.* "The narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial, such as the investigatory documents at issue here." *Id.* The court explained:

[N]either this Court nor the Supreme Court has ever indicated that it would apply the *Richmond Newspapers* [right of access to criminal proceedings] test to anything other than criminal judicial proceedings. Indeed, there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation, such as the information sought in this case.

*Id.* at 935. "We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism." *Id.*

<sup>151</sup> *Id.* at 936. The court stated that the common law right of access extends to the public records of all three branches of government. As such, there was a question of whether the names of the detainees sought would be public information. Even assuming so, FOIA is the proper vehicle to obtain government records, having preempted any common law right. *Id.*

<sup>152</sup> *E.g., id.* at 939–40 (Tatel, J., dissenting) ("No matter the level of deference, our review is not 'vacuous.'") (citing *Pratt v. Webster*, 673 F.2d 408, 421 (D.C. Cir. 1982)). Judge Tatel further explained, "[b]y accepting the government's vague, poorly explained allegations, and by filing in the gaps in the government's case with its own assumptions about facts absent from the record, this court has converted deference into acquiescence." *Id.* at 940.

<sup>153</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 937–38 (Tatel, J., dissenting) (recognizing the "uniquely compelling governmental interests" of being able to protect the nation from future terrorist attacks, but stating this interest must be balanced with the public's interest in knowing whether the government has acted improperly toward the detainees).

<sup>154</sup> *See id.* at 951 (pointing out that concerns over lawyers' safety must be described with "reasonable specificity"); *id.* at 939 (stating that it was the "legislature's judgment that the judiciary must play a meaningful role in reviewing FOIA exemption requests"); *id.* at 951 (stating that Congress created the judiciary's role to "require meaningful judicial review of all government exemption claims").



that the mere possibility of potential harms did not satisfy the statutory requirement.<sup>155</sup>

Judge Tatel's second major contention with the majority's opinion was that it embraced an "all or nothing" approach to the requested documents and did not require the government to segregate or categorize any of the names.<sup>156</sup> Judge Tatel recognized that some, if not much, of the requested information should be exempt,<sup>157</sup> so he ultimately posited that the case should be remanded to the lower courts to allow the government to describe with particularity the basis on which it was withholding the names or the categories of names.<sup>158</sup> He found it essential that the government provide greater specific justification for each detainee or, at least, each category of detainees.<sup>159</sup>

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<sup>155</sup> *Id.* at 942–43 (Tatel, J., dissenting) ("That Reynolds believes these harms *may* result from disclosure is hardly surprising—anything is possible. But before accepting the government's argument, this court must insist on knowing whether these harms '*could reasonably be expected to*' result from disclosure—the standard Congress prescribed for exemption under 7(A).").

<sup>156</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 940 (Tatel, J., dissenting) ("Although I have no doubt that some of the requested information is exempt from FOIA's mandatory disclosure requirement, the court treats disclosure as an all-or-nothing proposition . . ."); *id.* ("[T]he government bears the burden of reviewing the plaintiffs' request, identifying functional categories of information that are exempt from disclosure, and disclosing any reasonably segregable, non-exempt portion of the requested materials."); *id.* at 941 (The government's request for exemption 7(A) "treats all detainees the same"); *id.* at 942 (stating that people with critical information and other general detainees are "two different categories of people" and "thus merit different treatment"); *id.* at 943 (Another failing with the court's analysis is that it "treat[s] all detainee information the same . . ."); *id.* at 950 ("[T]he court's all-or-nothing approach again impermissibly shifts the burden of identifying exempt information from the government to plaintiffs."). *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 235–36 (1978), allows government agencies to exempt categories of records without having to justify each individual record, or in this case, each detainee. The categories must be "sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.'" *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986) (quoting *Campbell v. Dep't of Health & Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982)).

<sup>157</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 937 (Tatel, J., dissenting) ("While the government's reasons for withholding *some* of the information may well be legitimate, the court's uncritical deference eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.").

<sup>158</sup> *Id.* at 951 (Tatel, J., dissenting).

<sup>159</sup> *Id.* Judge Tatel stated:

If there are legitimate investigative reasons for releasing the names of some detainees, but not others, then Mr. Reynolds or others responsible for the terrorism investigation should explain those reasons under oath—in an in camera affidavit, if necessary to protect the information—and that explanation would probably warrant judicial deference.

*Id.* at 944.

Third, Judge Tatel stressed that the general principle of FOIA is one of openness and that the exemptions should be narrowly applied.<sup>160</sup> With the concern over potential abuses of detainees, the public had a vital interest in having access to the names, even if there was some privacy interest on the part of the individuals.<sup>161</sup> He also pointed out that the government had released some of the

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<sup>160</sup> *Id.* at 938 (Tatel, J., dissenting) (“To be sure, the statute strongly favors openness . . . .”); *id.* (“[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.”) (internal quotations omitted). Thus, the exemptions must be ‘narrowly construed’ and ‘the burden is on the agency to sustain its action.’ *Id.* (quoting *John Doe Agency v. John Doe Corp.* 493 U.S. 146, 152 (1989)).

<sup>161</sup> *Id.* at 946 (Tatel, J., dissenting) (stating that any privacy interest the detainees have “is clearly outweighed by the public interest in knowing whether the government, in investigating those heinous crimes, is violating the rights of persons it has detained”). The judge went on to discuss the D.C. Circuit’s precedent in *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205–06 (D.C. Cir. 1991), that allowed a requestor to obtain names of individuals in law enforcement files if the requestor is not doing so for personal reasons and if the requestor can show compelling evidence that the agency is engaged in illegal activity, which the judge believed applied in this case. *Ctr. for Nat’l Sec. Studies II*, 331 F.3d 946–48 (Tatel, J., dissenting).

The ruling denying disclosure was especially disappointing to some because of the recognized abuses of the post-9/11 detainees by the Department of Justice. See Press Release, ACLU, ACLU Says Court Decision Allowing Secret Abuses Ignores Internal Justice Department Report of 9/11 Detainee Abuse (June 17, 2003), at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12924&c=206> (“The American Civil Liberties Union strongly criticized today’s appeals court decision upholding the government’s secret arrest policy after 9/11, saying the ruling ignored mounting evidence of the government’s misconduct in its treatment of detainees held in the months after the attacks.”); Richard A. Serrano, *Detained Innocents Tell of Ruin: U.S. 9/11 Dragnet Rife with Abuses, Many Contend*, CHI. TRIB., June 9, 2003, § 1, at 12; see also OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (June 2003) (containing an extensive discussion on the Department of Justice’s handling of the post-9/11 detentions as well as the abuses in the process), available at <http://www.usdoj.gov/oig/special/03-06/full.pdf>. But see Steve Fainaru, *Court Says Detainees’ ID Can Be Kept Secret*, WASH. POST, June 18, 2003, at A1. Mr. Fainaru’s article stated:

Steven R. Shapiro, legal director for the American Civil Liberties Union, said the [D.C. Circuit] erred by apparently failing to take the inspector general’s findings into consideration.

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However, Eugene Volokh, a professor of law at UCLA, said it was unreasonable to expect the appellate court to consider as evidence the findings of a report that, however credible, may have been based on hearsay testimony by witnesses not subject to cross-examination.

names itself, thus contradicting its position that any disclosure of the names could impair national security.<sup>162</sup>

3. *Critique: Increased deference warranted, but it should not be applied too broadly*

The D.C. Circuit's holding illustrates the general trend toward greater judicial deference in matters of terrorism threat protection and homeland security.<sup>163</sup> The decision,<sup>164</sup> however, may not be a perfect model even if one concedes that times have changed and that courts must provide federal agencies more leeway in withholding information.

The difference between the majority and dissent's views<sup>165</sup> of deference is primarily a matter of degree.<sup>166</sup> The majority was only willing to analyze to a

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<sup>162</sup> *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 944 (Tatel, J., dissenting). The majority, however, countered that the government may choose to release some information deliberately for strategic reasons, but "[t]he disclosure of a few pieces of information in no way lessens the government's argument that complete disclosure would provide a composite picture of its investigation and have negative effects on the investigation." *Id.* at 930; *see also* *Fitzgibbon v. CIA*, 911 F.2d 755, 766 (D.C. Cir. 1990) ("[T]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods[,] and operations.").

<sup>163</sup> *See* Fainaru, *supra* note 161 ("Attorney General John D. Ashcroft applauded the ruling . . . 'We are pleased the court agreed we should not give terrorists a virtual roadmap to our investigation that could allow terrorists to chart a potentially deadly detour around our efforts,' [he said in a statement]."); Tom Brune, *Appeals Court Backs U.S. on Secrecy*, *Newsday*, June 18, 2003, at A16 ("Attorney General John Ashcroft praised the ruling, calling it 'a victory for the Justice Department's careful measures to safeguard sensitive information about our terrorism investigations as well as the privacy of individuals who chose not to make public their connection to the government's probe.'").

<sup>164</sup> *See* Fainaru, *supra* note 161. Mr. Fainaru's article further stated:

Kate A. Martin, lead attorney for the Center of National Security Studies, part of the coalition that challenged the policy, said an appeal is likely, although no decision has been made on whether the groups would ask the full appellate court to review the case or appeal directly to the Supreme Court.

*Id.*

<sup>165</sup> *See* Fainaru, *supra* note 161 (pointing out that the writer of the majority opinion, Judge David Sentelle, was a Reagan appointee to the court, and that he was joined in the opinion by Judge Karen Henderson, an appointee of the first President Bush). The dissenting judge, Judge David Tatel, was appointed by President Clinton. *Id.*

<sup>166</sup> *See* *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("We realize that recognizing this necessary Executive leeway [for immigration-related expertise] will often call for difficult judgments."). Though it is in a different context, the Supreme Court recognized the difficulty in pinpointing the appropriate amount of judicial deference.

certain degree. It was content with non-searching<sup>167</sup> or non-probing<sup>168</sup> judicial review, justifications that were “reasonable,”<sup>169</sup> displayed an “adequate connection”<sup>170</sup> or a loose version of a “rational link,”<sup>171</sup> or, in the language of the Third Circuit, security concerns that “seem credible.”<sup>172</sup> While the majority was willing to extend their deference to the expertise of the agency specialists, the dissent was not persuaded that the judiciary ought now “simply . . . trust its judgment.”<sup>173</sup> The majority correctly describes the substance of the entire debate when it stated, “Exemption 7(A) explicitly requires a predictive judgment of the harm that will result from disclosure of information.”<sup>174</sup> The majority was convinced that the agency experts were the proper source for this “predictive judgment,”<sup>175</sup> whereas the dissent, along with the district court,<sup>176</sup> insisted on being more probing and requiring greater articulation from the government before allowing non-disclosure.<sup>177</sup> The exemption’s plain, open-ended language calls for a fact-based judgment: “*could reasonably be expected* to interfere with

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<sup>167</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 927 (stating that the D.C. Circuit has “found it unwise to undertake searching judicial review”).

<sup>168</sup> *Id.* at 932 (highlighting the fact that the Third Circuit “did not search for specific evidence that each of the INS detainees was involved in terrorism, nor did it embark on a probing analysis of whether the government’s concerns were well-founded”).

<sup>169</sup> *Id.* at 928 (stating that government expectation that terrorist groups could map a course of the investigation by getting a complete list of names to be “reasonable”); *id.* at 929 (“[T]he government’s judgment that disclosure would deter or hinder cooperation by detainees is reasonable.”); *id.* at 931 (“It is therefore reasonable to assume that disclosure of their names could impede the government’s use of these potentially valuable witnesses.”).

<sup>170</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 931. (“[T]he government’s submissions easily establish an adequate connection between both the material witness and the INS detainees and terrorism to warrant full application of the deference principle.”).

<sup>171</sup> *Id.* (concluding that “the evidence presented in the declarations is sufficient to show a rational link between disclosure and the harms alleged”)

<sup>172</sup> *Id.* at 932 (quoting *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002)).

<sup>173</sup> *Id.* at 939 (Tatel, J., dissenting).

<sup>174</sup> *Id.* at 928.

<sup>175</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 928. (“It is abundantly clear that the government’s top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security.”). This is also in accord with the statute’s explicit language that “a court shall accord *substantial weight* to an affidavit of an agency concerning the agency’s determination [of] . . . subsection (b) [the propriety/necessity of exemption].” 5 U.S.C. § 552(a)(4)(B) (2000) (emphasis added).

<sup>176</sup> See *supra* notes 118–20 and accompanying text.

<sup>177</sup> See *supra* notes 152–55, 160.

enforcement proceedings.”<sup>178</sup> This Note contends that the post-9/11 security environment calls for increased deference to the executive branches for such a judgment, but the courts still must serve a screening function, albeit with a lower standard of analysis.<sup>179</sup> As such, the majority, in *Center for National Security Studies*, may have been closer to the mythical perfect balance. It is a close case, and different courts would undoubtedly differ on what level of evidence and specification to require in order to meet the exemption language’s threshold.

The dissent makes a strong point regarding the government’s unwillingness to segregate names which have a better argument for exemption and those which are practically harmless.<sup>180</sup> The government should be required to go the extra mile and provide a justification for each name, or at least each category of names, in order to get the exemption coverage, as enunciated in *NLRB v. Robbins Tire & Rubber Co.*<sup>181</sup> If the government does not make such a categorization, and cannot provide an explanation describing why categorization was not appropriate, courts should analyze the FOIA denial with greater scrutiny.<sup>182</sup> This suggestion calls

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<sup>178</sup> 5 U.S.C. § 552(b)(7)(A) (2000) (emphasis added). See *supra* note 54 for a discussion regarding the change of the statutory language from “would reasonably be expected” to “could reasonably be expected.” Such a change “represent[ed] a considered congressional effort to ‘ease considerably a Federal law enforcement agency’s burden in invoking [the exemption].’ ” *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 n.9 (1989).

<sup>179</sup> A good description of such a “screening function” was given in *Gardels v. CIA*, 689 F.2d 1100, 1104 (D.C. Cir. 1982). (“Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts ‘need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.’ ”) (quoting *Weissman v. CIA*, 565 F.2d 692, 697 (D.C. Cir. 1977)).

<sup>180</sup> See *supra* notes 156–61 and accompanying text.

<sup>181</sup> 437 U.S. 214 (1978). This landmark case established that a federal agency was permitted to make a “generic” showing of interference for entire categories of law enforcement records rather than being required to justify the exemption on a case by case basis. This concept is still precedent for courts even though the decision came before the 1986 amendments, so agencies can still make the “generic category” argument, but these categories mainly involve witness statements and notes of interviews of and correspondence with charging parties when there is a charge on the horizon. See *J.P. Stevens & Co., v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983) (holding that early release of affidavits and interviews of charging parties and witnesses, correspondence with attorneys, and internal memoranda concerning EEOC investigation would interfere with enforcement proceeding by chilling potential witnesses, drying up sources of information, hampering agency communication about the investigation). If the information is not in one of these specific, limited categories, the government must demonstrate the connection between the information they are trying to exempt and the “interference” it will cause with law enforcement proceedings.

<sup>182</sup> This is in line with the plain language of the statute that allows FOIA exemptions for law enforcement purposes “only to the extent that the production of such law enforcement

into question the viability of the “mosaic theory” to exemption 7(A) cases.<sup>183</sup> While the dissent, in *Center for National Security Studies*, points out that deference to such a theory was formerly only granted in exemption 1 and 3 cases,<sup>184</sup> the reality of our new homeland security situation necessitates allowing it to be extended to exemption 7. Just as the new Office of Homeland Security has, to a large degree, merged law enforcement, national security, and intelligence functions,<sup>185</sup> FOIA exemption 1 and 7(A) must be viewed with considerable overlap.<sup>186</sup> However, as the government should be required to segregate records to a reasonable degree,<sup>187</sup> invocation of the mosaic theory should warrant closer scrutiny by courts.

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records or information . . . could reasonably be expected to interfere . . .” 5 U.S.C. § 552(b)(7)(A) (2000) (emphasis added).

<sup>183</sup> See *supra* note 139–40 and accompanying text.

<sup>184</sup> See *supra* note 141.

<sup>185</sup> See *supra* note 29; see also Press Release, Office of the Press Secretary, President Bush Signs Homeland Security Act (Nov. 25, 2002), available at <http://www.whitehouse.gov/news/releases/2002/11/20021125-6.html>. President Bush stated that “[t]he new department will analyze threats, will guard our borders and airports, protect our critical infrastructure, and coordinate the response of our nation for future emergencies. The Department of Homeland Security will focus the full resources of the American government on the safety of the American people.” *Id.* The President also stated that

this new department will analyze intelligence information on terror threats collected by the CIA, the FBI, the National Security Agency and others. The department will match this intelligence against the nation’s vulnerabilities—and work with other agencies, and the private sector, and state and local governments to harden America’s defenses against terror.

*Id.*

<sup>186</sup> Exemption 1 withholds information “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and . . . are in fact properly classified pursuant to such Executive Order.” 5 U.S.C. § 552(b)(1)(A), (B). Exemption 7(A) withholds information compiled for law enforcement purposes that “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A) (2000).

<sup>187</sup> The statute requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b) (emphasis added). See *Flightsafety Serv. Corp. v. Dep’t of Labor*, 326 F.3d 607, 612 (5th Cir. 2003) (allowing non-disclosure if “any disclosable information is so inextricably intertwined with the exempt, confidential information that producing it would require substantial agency resources and produce a document of little informational value[.]” even where only a “representative sample” of documents was presented to the district court for review); *Trans-Pac. Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (“It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.” (quoting *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977))); *Solar Sources v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (finding that a small percentage of documents that could be disclosed were not reasonably segregable from

### C. Related Post-9/11 Cases

*Center for National Security Studies v. Department of Justice* is unique, to this point, in how squarely it fits the question of whether FOIA was indeed altered with the Ashcroft and Card Memorandums and how one court reacted in the post-9/11 atmosphere. There are some related cases, though, that shed light on different courts' approaches to open access after September 2001.

Along with *North Jersey Media Group, Inc. v. Ashcroft*<sup>188</sup> the *Center for National Security Studies* majority referenced other circuits' decisions to demonstrate the other courts' post-9/11 willingness to defer to the government's request to tighten security; these cases include the Fourth Circuit's decision in *Hamdi v. Rumsfeld*,<sup>189</sup> the Seventh Circuit's decision in *Global Relief Foundation v. O'Neill*,<sup>190</sup> and another Fourth Circuit case, *Hamdi v. Rumsfeld*.<sup>191</sup>

The Sixth Circuit went against this growing tide of deference in *Detroit Free Press v. Ashcroft*,<sup>192</sup> a case in which three news agencies sought an injunction under a First Amendment Freedom of Press claim after the government closed the non-citizen removal hearings of primarily Arab and Muslim men.<sup>193</sup> The Sixth Circuit found that there was a right of access to deportation hearings because such hearings are similar to judicial hearings wherein there is a recognized right of access.<sup>194</sup> The government attempted to argue that the *Richmond Newspapers* standard of access was limited to the judicial context and that administrative

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documents that were properly withheld); *Lead Indus. Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979) ("[I]f the proportion of nonexempt factual material is relatively small and is so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, it is not 'reasonably segregable.'") (citation omitted).

<sup>188</sup> 308 F.3d 198 (3d Cir. 2002); see *supra* note 145–46 and accompanying text.

<sup>189</sup> 296 F.3d 278, 282–83 (4th Cir. 2002) (disallowing an alleged enemy combatant the right of unmonitored access to counsel).

<sup>190</sup> 315 F.3d 748, 754 (7th Cir. 2002) (upholding the constitutionality of a portion of the USA-PATRIOT Act that allows *ex parte* use of classified evidence in proceedings to freeze terrorist organization assets).

<sup>191</sup> 316 F.3d 450, 476 (4th Cir. 2003) (dismissing habeas corpus petition of U.S. citizen captured in Afghanistan challenging his military detention and designation as an enemy combatant).

<sup>192</sup> 303 F.3d 681 (6th Cir. 2002).

<sup>193</sup> See *id.* at 684.

<sup>194</sup> See *id.* at 695–96 (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)). *Richmond Newspapers* employed a two-part "experience and logic" test to determine whether a particular aspect of a proceeding outside of the actual trial phases should be open to the public. See *id.* at 695.

proceedings should be governed by a more deferential standard.<sup>195</sup> The court was unpersuaded because the facts of the case where the Supreme Court granted more deference were distinguishable and this administrative proceeding exhibited “substantial quasi-judicial characteristics.”<sup>196</sup> Further, the court found that deportation hearings had traditionally been accessible to the public,<sup>197</sup> and public access plays a significant positive role in deportation hearings.<sup>198</sup> The court recognized, however, that there could be a limit to the public’s right of access if the government could demonstrate a compelling interest under strict scrutiny analysis.<sup>199</sup> Though the court found that the government did show a compelling interest,<sup>200</sup> its directives were not narrowly tailored or required particularized findings on a case-by-case basis.<sup>201</sup> This insight is particularly revealing because it shows that the court would have been willing to grant deference to the government to deal with its compelling interest of combating terrorism if the government had demonstrated particularized, or categorized, findings rather than asserting an all-or-nothing type approach to the exemption.<sup>202</sup> The *Center for*

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<sup>195</sup> *Id.* at 694 (citing *Houchins v. KQED*, 438 U.S. 1 (1978)).

<sup>196</sup> *Id.* The court also noted that “it is clear that the [Supreme] Court has since moved away from its position in *Houchins* [of less access in administrative proceedings] and recognizes that there is a limited constitutional right to some government information.” *Id.* at 695.

<sup>197</sup> *Id.* at 700–03.

<sup>198</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703–05 (6th Cir. 2002). The positive roles that the public plays in the process included: acting as a check on the actions of the Executive, ensuring the government does its job properly, serving as a “therapeutic” resource for those who might think they are being targeted after September 11, enhancing the perception of integrity and fairness, and ensuring the individual citizen can participate in the process.

<sup>199</sup> The compelling governmental interest would have to be narrowly tailored and be specifically articulated enough to allow a reviewing court to determine if closure was proper. *Id.* at 705 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986)).

<sup>200</sup> *Id.* at 706 (“The Government certainly has a compelling interest in preventing terrorism.”). The Sixth Circuit disagreed with the district court and found the government’s arguments for prohibiting public access compelling. *Id.* at 705–06. Displaying much the same type of deference that FOIA exemption 1 cases often receive, the court stated: “Inasmuch as these agents’ declarations establish that certain information revealed during removal proceedings could impede the ongoing anti-terrorism investigation, we defer to their judgment. These agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations.” *Id.* at 707.

<sup>201</sup> *Id.* at 707–10.

<sup>202</sup> *Detroit Free Press*, then, supports this author’s thesis that deference should be granted to agency expertise on security, but there needs to be some reasonable attempt to categorize and separate requests. 303 F.3d at 703–05. Invoking deference for an entire list, if a sizeable request with many items, should be viewed with greater scrutiny by the courts. *See supra* notes 181–82 and accompanying text.



*National Security Studies* majority recognized that “not all courts are in agreement” regarding increased deference,<sup>203</sup> and that it did not find the Sixth Circuit’s reasoning compelling.<sup>204</sup>

*Ayyad v. Department of Justice*,<sup>205</sup> a district court case, dealt with a plaintiff convicted of participating in the 1993 World Trade Center bombing who made a FOIA request for all documents relating to the investigation of him. The court found that the government satisfied its burden under exemption 7(A) since there was an on-going investigation of a potential co-conspirator with which it could interfere, and the government “provided adequate evidence of the specific harm anticipated should the individual categories of information be released.”<sup>206</sup> Though the case was filed before September 11, 2001, and the government did not discuss that event at all,<sup>207</sup> the court did make special note of the increased likelihood of a terrorist threat and how information rationally tied to law enforcement purposes deserved deference.<sup>208</sup>

Exemption 7 was slated to receive a clearer exegesis from the Supreme Court after it granted writ of certiorari on *City of Chicago v. United States Department of Treasury*,<sup>209</sup> where the Seventh Circuit denied the Bureau of Alcohol, Tobacco, and Firearms (“ATF”) the exemption 7 denial that they sought because the Bureau failed to demonstrate sufficient specificity of the harms alleged.<sup>210</sup>

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<sup>203</sup> *Ctr. for Nat’l Sec. Studies II*, 331 F.3d at 932.

<sup>204</sup> *Id.*

<sup>205</sup> No. 00 Civ. 960 (KTD), 2002 U.S. Dist. LEXIS 6925 (S.D.N.Y. Apr. 17, 2002).

<sup>206</sup> *Id.* at \*9.

<sup>207</sup> *Id.* at \*9 n.4.

<sup>208</sup> The court wrote:

The crime at issue here is an act of terrorism. Also, I take judicial notice that Plaintiff is a member of a network of co-conspirators, who have additionally been implicated in the acts of September 11th. As those events show, some of Plaintiff’s co-conspirators may have evaded capture and may still be engaging in terrorist activities in the United States. There is a high likelihood that Plaintiff’s file contains information regarding previously less active “sleeper cells” that the Government may need to use to detect threats to the integrity of the nation’s security. Thus, intensifying my concerns about the potential harm of releasing Ayyad’s FBI file.

*Id.* at \*8–9.

<sup>209</sup> 287 F.3d 628 (7th Cir. 2002) [hereinafter *City of Chicago I*], amended upon denial of rehearing *en banc*, 297 F.3d 672 (7th Cir. 2002) [hereinafter *City of Chicago II*], and cert. granted, 71 U.S.L.W. 3337 (U.S. Nov. 12, 2002) (No. 02-0322).

<sup>210</sup> *City of Chicago I*, 287 F.3d at 634 (“The potential for interference set forth by ATF is only speculative and not the ‘actual, contemplated enforcement proceeding’ that Congress had in mind when drafting Exemption 7(A) [citing *NLRB v. Robbins Tire & Rubber*, 437 U.S. 214, 232 (1978)].”). The Seventh Circuit stated that the government was not required to show a specific instance where released information *had* interfered with an enforcement proceeding. *Id.* However, in order to meet the requirement for the FOIA exemption, the court stated that the

However, the Court removed the case from the docket, cancelled the oral argument scheduled for March 4, 2003, and vacated the Seventh Circuit's decision<sup>211</sup> after Congress passed a statute that specifically prohibits the ATF, in certain circumstances, from using appropriated funds to comply with FOIA requests<sup>212</sup>—creating a new issue and necessitating remand to the lower courts for consideration in light of the recent legislation. Though it was not a homeland security situation, the case was a good example of how courts have dealt with the salient issue of how specific a nexus the government must demonstrate in order to receive exemption 7, or exemption 1, protection to deny FOIA requests.

VI. RECOMMENDATIONS: GREATER DEFERENCE TO FOIA'S LAW  
ENFORCEMENT EXEMPTIONS IS APPROPRIATE IF PROPERLY SEGREGATED  
AND TAILORED TO HOMELAND SECURITY MATTERS

FOIA has had quite a roller-coaster ride since the mid-1960s, and the post-9/11 emphasis on homeland protection has provided a new twist. Though advocacy groups have expressed concern over the Administration's measures,<sup>213</sup> it seems possible that the rhetoric may be overblown.<sup>214</sup> The approach to FOIA for both the executive branch and the judiciary has shifted a bit, but the increased deference for law enforcement agencies to withhold information under exemption 1 or exemption 7 of FOIA is a necessary step to promote greater homeland protection. FOIA's language is still intact, and the executive branch, with the mandate for homeland protection, deserves flexibility considering our

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government did need to show that its predictions of a possible risk were reasonable, "not only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference." *Id.* The court also refused to grant deference to the agency's expertise on the matter, because such deference is limited to when "the agency has demonstrated with specificity a logical connection between the information withheld and identified investigations, and where the agency has submitted uncontroverted affidavits." *Id.* at 633.

<sup>211</sup> *Dep't of Justice v. City of Chicago*, 71 U.S.L.W. 3565 (U.S. Feb. 26, 2003) (No. 02-322). For more information on the case and legislation, see OFFICE OF INFORMATION AND PRIVACY, U.S. DEP'T OF JUSTICE, FOIA POST: SUPREME COURT TO DECIDE LAW ENFORCEMENT DATABASE CASE (posted Nov. 22, 2002), at <http://www.usdoj.gov/oip/foiapist/2002foiapist28.htm>.

<sup>212</sup> Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-007, § 644, 117 Stat. 11, 473-74 (2003).

<sup>213</sup> See *supra* notes 83-84; see also Giuffo, *supra* note 83 ("I think [increased government secrecy] is genuinely a crisis," said Doug Clifton, Editor of the Cleveland Plain Dealer.").

<sup>214</sup> See *supra* note 90; see also Hammitt, *supra* note 82 ("While there is no substantial empirical evidence that any of these [Attorney General] memos worked a significant influence on implementation, clearly they do set the tone by which the administration will be known.").

current world environment.<sup>215</sup> While courts will and ought to defer to agency expertise, they must still serve as screeners for some minimal justification and necessary segregation to ensure that the exemptions are not abused—even if it is just to ensure that the proper procedures for FOIA denials are followed.<sup>216</sup> The executive branch must also ensure that such deference is limited to matters of homeland security so that it is not abused and the spirit of FOIA is not thwarted.

The standard for exemption 1 or 7 claims should now be the government's ability to demonstrate some minimal "rational link" to a potential harm,<sup>217</sup> along with demonstrating sufficient categorization of requests so invocation of deference is not overly broad.<sup>218</sup> Again, this should not be an excessively high standard—that is the whole point of increased deference.<sup>219</sup> Courts still have a

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<sup>215</sup> See Kirtley Interview, *supra* note 27 (stating that the solution to the executive branch's actions may rest in litigation or more congressional involvement through either oversight or passing another law).

<sup>216</sup> See *supra* note 179.

<sup>217</sup> See *Ctr. for Nat'l Sec. Studies I*, 215 F. Supp. 2d at 102 ("[T]he Government has not met its burden of establishing a 'rational link' between the harms alleged and disclosure." (citing *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 789 F.2d 64, 67 (D.C. Cir. 1986))); see also *City of Chicago v. United States Dep't of the Treasury*, 287 F.3d 628, 633 (7th Cir. 2002) ("[Seven (A)] deference is limited only to situations in which the agency has demonstrated with specificity a logical connection between the information withheld and identified investigations."). As is often found, it is a matter of courts' statutory interpretation with how the 7(A) language "could reasonably be expected to interfere with enforcement proceedings" will be read and applied. See notes 165–78 and accompanying text for an in-depth analysis of this debate as contained in *Ctr. for Nat'l Sec. Studies II*. For an exhaustive description of exemption 7 litigation and how different courts have dealt with this situation, see LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 155–84 (Allan R. Adler ed., 1997).

<sup>218</sup> See *supra* note 187.

<sup>219</sup> See *supra* notes 167–72. For the Third Circuit in *N. Jersey Media Group*, government claims just needed to "seem credible." *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 219 (3d Cir. 2002). For the *Center for National Securities Studies* court, government claims just needed to be "reasonable" with little scrutiny. *Ctr. for Nat'l Sec. Studies II*, 331 F.3d at 926. In the exemption 1 context (withholding authorized under Executive Order if related to national security), the D.C. District Court noted in *ACLU v. Dep't of Justice*, 265 F. Supp. 2d 20, 29–30 (D.D.C. 2003), that "the governing standard in this [exemption 1] context is not especially onerous: the agency must demonstrate 'a logical connection between the information and the claimed exemption, and [the affidavits submitted to draw this connection] are not controverted by either contrary evidence in the record nor by evidence of bad faith.'" (quoting *Abbotts v. Nuclear Regulatory Comm'n*, 766 F.2d 604, 606 (D.C. Cir. 1985)). The D.C. Circuit Court of Appeals has stated:

The test is not whether the court personally agrees in full with the [agency's] evaluation of the danger—rather, the issue is whether on the whole record the [a]gency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in

role in the FOIA process to ensure procedures were properly followed and that there is a measure of reason and rationality to the government's claims, but our national security necessitates a shift in deference so courts do not overly scrutinize agency decisions.<sup>220</sup> The Ashcroft Memo still requires a "sound legal basis" for any exemption,<sup>221</sup> so while agencies may be a bit more conservative in their decisions, fears of extreme government secrecy are not warranted because the FOIA language remains unchanged.<sup>222</sup>

There is a very real threat of terrorism that is now undeniable,<sup>223</sup> along with the aftermath of the Iraq war, and overall Middle-East instability. The executive

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this field of foreign intelligence in which the [agency] is expert and given by Congress a special role.

*Gardels v. CIA*, 689 F.2d 1100, 1105 (D.C. Cir. 1982). Again, it is recognized that this court is describing exemption 1 deference, but the line between exemption 1 and exemption 7 may be blurred a bit in the current national security context. *See supra* notes 185–86 and accompanying text.

<sup>220</sup> Again, the statute's explicit language states that "a court shall accord *substantial weight* to an affidavit of an agency concerning the agency's determination [of] . . . subsection (b) [the propriety/necessity of exemption]." 5 U.S.C. § 552(a)(4)(B) (emphasis added).

<sup>221</sup> *See Ashcroft Memo, supra* note 76, at para. 5.

<sup>222</sup> The Homeland Security Act of 2002 contained a new platform for a 5 U.S.C. § 552(b)(3) exemption which covers materials "specifically exempted from disclosure by statute." The Homeland Security Act mandated that "critical infrastructure" information voluntarily submitted to the Department of Homeland Security ("DHS") be exempt from either federal or state FOIA disclosure. Pub. L. No. 107-296, 116 Stat. 2135, § 214(a)(1)(A) (to be codified at 6 U.S.C. § 133(a)(1)(A)). The legislation allows businesses and other institutions to provide information to the DHS that could be relevant to homeland protection and not fear such information being released to the public. Such congressional action strengthens belief in the present FOIA language using basic legislative analysis: if members of Congress looked at FOIA, albeit to a small degree, and did not make any changes, they must believe the present language is appropriate.

<sup>223</sup> *See Floyd Abrams, Address: The First Amendment and the War Against Terrorism*, 5 U. PA. J. CONST. L. 1 (2002):

To start: I am persuaded that the degree of threat to our individual security is unparalleled in American history. We live in a new world in which foreign terrorists, dedicated to our destruction, suicidal in behavior, and with possible access to modern weapons, imperil our people. If I thought otherwise, I would have very different views with respect to many of the comments I will offer to you today. If I thought the Al-Qaeda threat was a passing one, or akin to that of the Barbary pirates of the past, or the equivalent (as Michael Mandelbaum has argued) of a "badly stubbed toe" that caused pain and shock but left "the world ... much as it had [been] before," I would not be at all so ready to make painful compromises between the claims of security and freedom.

But I do consider the terrorist threats to us to be real and continuing, and thus transformative in their impact. MIT Professor Stephen Van Evera put it well when he said recently that "[w]e're in a struggle to the death with these people. They'd bring in nuclear

branch has the very difficult task of attempting to prevent future terrorist tragedies and if it concludes that concepts of open government must be narrowed, it deserves that discretion.<sup>224</sup> While the standard terrorist organization may not get all of their plans and schemes by using FOIA,<sup>225</sup> the executive branch is justified in tightening the reins on information which could be put to a destructive use.<sup>226</sup> The stakes are simply too high to allow a free flow of information, so the government's preventive efforts must be given some leniency at this time. Even open-government advocates respect the fact that the homeland security situation necessitates prudence.<sup>227</sup> FOIA can always be re-evaluated periodically for

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weapons here if they could. I think this could be the highest threat to our national security ever: a non-deterrable enemy that may acquire weapons of mass destruction."

*Id.* at 2-3.

<sup>224</sup> See *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) ("Ordinary principles of judicial review in this area recognize primary Executive Branch responsibility. They counsel judges to give expert agencies decisionmaking leeway in matters that invoke their expertise." (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990))); *Johnson v. Executive Office for United States Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (The court declined "to establish a brightline set of steps for an agency to take" in determining whether third parties are alive or dead, because the FOIA, "requiring as it does both systematic and case-specific exercises of discretion and administrative judgment and expertise, is hardly an area in which the courts should attempt to micro manage the executive branch."); see also Scordato & Monopoli, *supra* note 14, at 185 ("Prior external threats against the United States, dating back to the early days of our nation's history, have previously pushed Americans to agree to limits on their constitutional freedoms in pursuit of a larger goal—internal security.").

<sup>225</sup> See *infra* note 241 and accompanying text.

<sup>226</sup> Again, recognize that under a plain meaning approach to exemption 7 all that is required is that releasing information to the public "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000) (emphasis added). This standard should be flexible with the times, and security experts in the Department of Justice or other federal agencies are in the best position to determine if there is a reasonable possibility of interference or threat to homeland protection.

<sup>227</sup> See *Abrams*, *supra* note 223, at 5 ("My view, in short, is that we must accept that we now live at a level of vulnerability which requires distressing steps of a continuing nature in an effort to protect ourselves."); Kathleen Murphy, *War on Terror Restricts Information Flow*, STATELINE.ORG, Aug. 28, 2002, at <http://foi.missouri.edu/terrorismfoi/waronterror.html> (last modified Aug. 30, 2002) (quoting Tim Franklin, Editor of the ORLANDO SENTINEL, "I don't think anybody is suggesting that we should help give terrorists a playbook on how to wreak havoc. But at the same time, the thing that makes this country special in the world is that the government officials are held accountable for their actions on a regular basis."); Giuffo, *supra* note 83 (In an article about open records advocates' displeasure with the Administration's limits on disclosure, most advocates and journalists did recognize that "sensitive data . . . was reasonable to limit," but they were concerned this discretion had spilled over into non-law enforcement or homeland security areas.); Hammitt, *supra* note 82 ("There may be sound reasons during our current crisis to protect information that during more benign times might be ripe for disclosure."); Press Release, *supra* note 84 ("The government should protect

adjustment, and surely will be with each new administration.<sup>228</sup> The Act's substantial costs should prompt lawmakers to consider curtailing FOIA's reach as well.<sup>229</sup> Since the USA PATRIOT Act has "sunset provisions,"<sup>230</sup> any limiting of

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information as necessary—but only for as long as necessary—to protect national security.”); Davis, *supra* note 7 (“There is no question that in the world we live in today, there is some information that must remain secret to protect our national security. Beyond that narrow but important spectrum, however, the Congress, the public and the press should have maximum access to government information.”).

<sup>228</sup> At least one journalist, Laura Parker, has reported:

Peter Swire, a law professor at Ohio State University who served as a counsel on privacy in the Clinton administration, says that historically, the U.S. government has eased off demands for secrecy when two things have occurred.

“One is the reduced perception of threat. Things get better. The war ends,” he says. “The second is proven abuses caused by secrecy. So far, the Bush administration has been effective. We hope we won’t need congressional hearings to show how tragically wrong this instinct for secrecy has been.”

Parker et al., *supra* note 84, at 1A.

<sup>229</sup> See OFFICE OF INFORMATION AND PRIVACY, U.S. DEP’T OF JUSTICE, FOIA POST: SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2001 (posted Oct. 17, 2002), <http://www.usdoj.gov/oip/foiapost/2002foiapost27.htm>.

The costs for all federal FOIA offices in Fiscal Year 2001 was \$287,792,04. *Id.* Compliance with FOIA necessitated 4,924.715 work-years to process 2,246,212 requests for all federal agencies. *Id.* The Department of Justice was one of the leading federal departments in every statistical category, with 196,917 requests that produced 1,055.98 work-years, for its 1,000 full-time FOIA employees. *Id.* Total FOIA costs for the Department of Justice alone were \$74,336,344. See U.S. DEPARTMENT OF JUSTICE, FREEDOM OF INFORMATION ACT (FOIA), REPORT FOR FISCAL YEAR 2001, at [http://www.usdoj.gov/oip/annual\\_report/2001/01foiapg9.htm](http://www.usdoj.gov/oip/annual_report/2001/01foiapg9.htm) (last visited Sept. 14, 2003).

While the government can charge FOIA requestors for search and duplication, often these fees are waived if disclosure is “in the public interest.” 5 U.S.C. §§ 552(a)(4)(A), (A)(iii) (2000). Most noteworthy, most federal agencies do not receive any categorized funding for FOIA compliance and must draw from their operating budget to fund FOIA offices. See Robert L. Saloschin, *The Department of Justice and the Explosion of Freedom of Information Act Litigation*, 52 ADMIN. L. REV. 1401, 1405 n.18 (2000) (Saloschin concluded that it was almost impossible to approximate the cost of administering FOIA, except that it was in the many millions: “In addition, we noted that money was not directly appropriated for FOIA work, but instead, it was actually funded from money designated for other agency activities.”). Congress recently passed legislation that specifically prohibits the ATF from using appropriated funds on FOIA requests. See *supra* note 212. Often, agencies must assign trained law enforcement or intelligence personnel to full-time FOIA work. See *Freedom of Information Act: Hearings Before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 578–79 (1981) (containing a statement of CIA Director William Casey reporting that the CIA had to assign two hundred individuals to review FOIA requests to ensure that confidential information was not disclosed).

While open government is an obviously noble desire, such aspirations must recognize the enormous costs to taxpayers in an era when federal budgets do not have a penny to spare. See

information by the Justice Department will also likely sunset.<sup>231</sup> Where the executive branch may want to scale back on information release for homeland protection, the judiciary should evaluate whether FOIA exemption claims are legitimate (albeit with a more deferential disposition), and Congress can evaluate FOIA's status and adjust the language if it believes that federal agencies and courts are out of line.<sup>232</sup> The separation of powers, thus, will synergistically work

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Lowe, *supra* note 69, at 1285–86 (“Today, FOIA is not operating as Congress intended . . . . Thus, when courts interpret FOIA provisions or the executive establishes new FOIA guidelines, it is imperative that the interests of the agencies are recognized along with the public’s right to disclosure.”). A single request by one former CIA agent cost over \$400,000. *See* *Agee v. CIA*, 517 F. Supp. 1335, 1342 n.5 (D.D.C. 1981). One of the reasons President Ford vetoed the 1974 amendments was the significant cost to federal agencies. *See* 120 CONG. REC. 36,243 (1974); Orrin G. Hatch, *Balancing Freedom of Information with Confidentiality for Law Enforcement*, 9 J. CONTEMP. L. 1, 9 (1983) (President Ford “pointed out that the law enforcement agencies would be economically hampered because the agencies could not afford to hire the large number of highly trained personnel necessary to review requested confidential files and records.”). The 1974 amendments significantly expanded FOIA provisions and subsequently escalated the costs:

What happened in the 1974 amendments to the Freedom of Information Act is similar to what happened in much of the regulatory legislation and rulemaking of that era: an entirely desirable objective was pursued singlemindedly to the exclusion of equally valid competing interests. In the currently favored terminology, a lack of cost-benefit analysis; in more commonsensical terms, a loss of all sense of proportion.

Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REG. Mar.–Apr. 14, 16 (1982). Justice Scalia called FOIA “the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored.” *Id.* at 15; *see also* McMasters, *supra* note 71 (“Thirty years later, the friends of FOIA in official Washington remain few and far between and the complaints familiar . . . . It is exploited by journalists to invade personal privacy and endanger national security.”).

<sup>230</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 224(a) (2001) (requiring that expanded surveillance measures “shall cease to have effect on December 31, 2005.”).

<sup>231</sup> *See War on Terrorism Reduces Access to Information*, (Radio Free Europe/Radio Liberty broadcast, Apr. 5, 2002), at <http://www.rferl.org/welcome/english/releases/2002/04/88-050402.html> (Leonard Sussman, senior scholar at Freedom House, “noted that the USA PATRIOT . . . Act recently passed by the U.S. Congress strikes a good balance [between protection and liberty] by including a sunset provision to end these monitoring practices [and the slowdown of information] in four years.”). Depending on the national and international environment, the Administration should recognize that security measures cannot remain at the highest level forever. *See* Hammitt, *supra* note 82 (“It would be a real shame if we permanently forfeited our right of access to government information because of short-term goals.”).

<sup>232</sup> *See supra* note 30 and accompanying text.

to ensure that FOIA's principles, with some flexibility, are still adhered to in the context of this threat.<sup>233</sup>

There are three primary dangers that might be present with the recent FOIA adjustments. First, as previously discussed, the overbreadth concern is based upon the premise that federal agencies will not make a reasonable effort to categorize or segregate requests so that the potential dangers can be better evaluated.<sup>234</sup> Second, with the courts being the objective evaluators of how federal agencies are handling FOIA requests and exemptions, the cases must get to court, which will only occur if the denied party pursues the appeal process.<sup>235</sup> There is not a great deal of litigation yet on federal agency FOIA abuses, and cases like *Center for National Security Studies* are rare at this point. The potential for abuse, though, exists because agencies may display the attitude, leaning on the Ashcroft Memo, that they will deny borderline cases and hope that the requestor does not appeal or that the courts will be sympathetic if it is a homeland security topic, as many critics have feared.<sup>236</sup> This, however, could be more of a theoretical problem than reality bears out. FOIA requestors who seek open government for the value of allowing public scrutiny predominantly tend to be media representatives and public interest organizations (as seen in *Center for National Security Studies*).<sup>237</sup>

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<sup>233</sup> See Kirtley Interview, *supra* note 27 (stating that litigation or Congress' passing of another law could "turn into a very interesting battle of separation of powers").

<sup>234</sup> See *supra* notes 156–59, 187 and accompanying text.

<sup>235</sup> Under 5 U.S.C. § 552(a)(6)(A), a FOIA request that is denied may be appealed to the head of the agency and must be reevaluated. While exhausting the administrative appeals prior to seeking judicial relief is not expressly codified, at least four circuit courts have held that it is implied that the administrative process be exhausted before heading to court. See *Hedley v. United States*, 594 F.2d 1043, 1044 (5th Cir. 1979); *accord Scherer v. Balkema*, 840 F.2d 437, 443 (7th Cir. 1988); *Brumley v. Dep't of Labor*, 767 F.2d 444, 445 (8th Cir. 1985); *Stebbins v. Nationwide Mut. Ins. Co.*, 757 F.2d 364, 366 (D.C. Cir. 1985). For more information on appealing a FOIA denial, see LITIGATION, *supra* note 217, at 7–8.

<sup>236</sup> As one expert noted:

[The Ashcroft Memo is] sending a signal to government agencies that if they wish to withhold information, the Justice Department will defend them. And, you know, there are literally hundreds, if not thousands of Freedom of Information Act decisions from courts, ranging from district courts all the way up to the Supreme Court, that have provided some kind of justification or pretext for withholding virtually every document in the possession of government. So it would be very easy to defend almost any attempt to withhold any information. And if the Justice Department is going to do that, that means that requesters are going to have a terrible time trying to pry information loose.

Kirtley Interview, *supra* note 27.

<sup>237</sup> See *supra* note 103; see also Saloschin, *supra* note 229, at 1403–04 (Saloschin notes that after the 1974 amendments, "the number of FOIA-related matters in the [Freedom of Information] Committee and in many agencies expanded explosively. The causes of this



These entities do have the resources, motivation, and where-with-all to pursue litigation. Thus, with all of the media and advocacy organizations, FOIA abuses by federal agencies will likely get noticed, and get litigated.

The third major concern for recent FOIA alterations is that the expanded liberty granted for homeland protection will be expanded to other government matters that have no connection to security.<sup>238</sup> The most noticeable example of this is Vice President Cheney's energy task force that was not released, nor has been, to Congress or the public.<sup>239</sup> Open-government advocates seem most concerned about how the *zeitgeist* for homeland protection has had such an overbreadth effect on unrelated topics,<sup>240</sup> while the Justice Department would deny such an assertion.<sup>241</sup> There is also the argument that restricting FOIA does not deter terrorism in any sense because terrorists are much too sophisticated to

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increase included the vigorous use of FOIA by Ralph Nader and his associates [and] . . . the use of FOIA by various scholars, advocates, and authors . . .").

<sup>238</sup> See, e.g., Parker et al., *supra* note 84, at 1A (reporting one case in which an individual sought a 30-year-old map of Africa to plan a relief mission and the National Archives told him that the government no longer makes such information public and another case in which another individual sought environmental information on chemical plants but was denied the information by the EPA).

<sup>239</sup> See Dana Milbank, *Cheney Refuses Records' Release*, WASH. POST, Jan. 28, 2002, at A1; Elisabeth Bumiller, *ENRON's Many Strands: The Vice President; Cheney Is Set to Battle Congress to Keep His ENRON Talks Secret*, N.Y. TIMES, Jan. 28, 2002, at A1; Neely Tucker, *Cheney-GAO Showdown Goes to Court*, WASH. POST, Sept. 28, 2002, at A5; Don Van Natta Jr., *Cheney Argues Against Giving Congress Records*, N.Y. TIMES, Sept. 28, 2002, at A1. As one critic has noted:

The Bush administration's refusal to disclose information to Congress or the public about actions taken by Vice President Dick Cheney's energy policy task force showed clearly the administration's philosophy of secrecy. For the first time, the General Accounting Office—an arm of Congress—sued the executive branch, because it cannot get the basic facts about who participated in what meetings.

Davis, *supra* note 7.

<sup>240</sup> See Murphy, *supra* note 227 ("Many state officials have followed Ashcroft's lead, arguing that restricting public access to many kinds of information will help prevent future attacks by hampering terrorists' activities. But civil rights groups and journalists counter that many of the restrictions have little to do with preventing terrorism.").

<sup>241</sup> The Attorney General vigorously defended the withholding of information last year:

"I cannot and will not divulge information . . . that will damage the national security of the United States, the safety of its citizens or our efforts to ensure the same in an ongoing investigation," Ashcroft told a Senate panel in December [2001]. "Each action taken by the Department of Justice . . . is carefully drawn to target a narrow class of individuals: terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists. Our prevention strategy targets the terrorist threat."

Parker et al., *supra* note 84, at 1A.

draw their information from the formal process of FOIA.<sup>242</sup> The Bush Administration risks losing both credibility and popularity if it does not contain the executive deference that it has been granted, in matters like government release of information under the FOIA, to only those spheres where appropriate.

## VII. CONCLUSION

The Freedom of Information Act has had a remarkable history, from its inception in 1966, through congressional amendments and the spin of previous presidential administrations. The Bush Administration's steps after September 11, 2001, have added a new chapter to the FOIA story. Courts extended considerable deference to exemption 1 even prior to 9/11, and exemption 7 was alive and well before the terrorist attacks as well. Courts must continue to play a screening role and demand some minimal justification along with a reasonable attempt of segregation of exempted categories. The outcry over the Ashcroft and Card Memos is exaggerated considering the grave concern of national security. Specifically, these memos are the rational policy choices for our present environment. FOIA's reach has shifted, but any increased deference for law enforcement agencies to withhold information under exemption 1 or exemption 7 of FOIA is appropriate if it is not applied too broadly and is limited to matters of homeland security. FOIA is not going away, and a denial by a federal agency still needs to have a "sound legal basis." However, the reality of our new homeland security situation prompts sacrifices such as more deference for FOIA exemptions.

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<sup>242</sup> See Murphy, *supra* note 228 (quoting Mark Gribben, public manager for the Michigan Press Association, "I don't believe terrorists file FOIA requests"); see also Kirtley Interview, *supra* note 27 ("There are apocryphal tales going back to, frankly, the Reagan administration about operatives for foreign powers using the FOI for the purpose of getting classified information. But they've never been demonstrated to be true.").